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**Subject:** Re: FCC/OALJ rquest for information

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**From:** Warren Havens (warren.havens@sbcglobal.net)

---

**To:** Austin.Randazzo@fcc.gov; Mary.Gosse@fcc.gov;

---

**Cc:** rjk@telcomlaw.com; Richard.Sippel@fcc.gov; ajc@catalanoplache.com; Brian.Carter@fcc.gov; czdebski@eckertseamans.com; Gary.Schonman@fcc.gov; cole@fhhlaw.com; Howard.Liberman@dbi.com; richards@khilaw.com; jim@jimchen.org; jsheldon@lb3law.com; jstobaugh@telesaurus.com; jturner@wileyrein.com; kdesoto@wileyrein.com; Laura.Phillips@dbi.com; mjp@catalanoplache.com; Pamela.Kane@fcc.gov; tpaoletta@wiltshiregrannis.com; Patrick.McFadden@dbi.com; feldman@fhhlaw.com; rkirk@wblaw.com; rhj@commlawgroup.com; gurss@fhhlaw.com; tdamari@nossaman.com; Terry.Cavanaugh@fcc.gov; wright@khilaw.com;

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**Date:** Thursday, March 21, 2013 10:51 AM

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Mr. Randazzo,

In response, please see Attachment 1 hereto and the below.

I wrote in my recent pro-se pleadings that Maritime objected in the Maritime Antitrust Case, in USDC NJ, to attorney Jim Chen's participation in this FCC Hearing.

The objection was made in writing and orally given to my companies' counsel in this case. The writing includes what I attach and notate here. (My companies' counsel has been in depositions this week, and still is, and has asked his staff to look for other documents responsive to this issue, including email and transcriptions, and if located, I will provide them.)

The Maritime assertion of conflict including in the attached is an objection under DC bar rule. See Note below.[\*]

While I cannot disclose attorney client confidential communications, it is my clear understanding that Maritime was and in fact is challenging Mr. Chen's important role as my companies' antitrust law expert in the NJ court action (the Maritime Antitrust Case, as I have described it in this Hearing) by asserting that his concurrent representation in this Hearing created a conflict that should bar or downgrade his expert role in the Maritime Antitrust Case. Accordingly, I discharged Mr. Chen from representation in the FCC Hearing, as I wrote.

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I also note here, again, that Maritime is vigorously attempting to bar relevant evidence to issues in the HDO FCC 11-64-- (including as to issue (g), but also other issues including those that now related to the Second Thursday showing)-- that is coming forth in the Maritime Antitrust Case, from the FCC including the Judge and Enforcement Bureau in this Hearing. An recent example is shown in Attachment 2 hereto, which I discuss in a cover memo to this attachment. I believe the Judge may properly act upon this matter within his authority, and with no conflict with the Maritime Antitrust Case.

- - - - -

Respectfully,

Warren Havens  
SkyTel entities

[\*] Note.

While I do not believe this below-noted conflict objection can be properly raised in the matter noted above, nevertheless, it was raised by Maritime and that poses a

major risk I had to resolve.

DC Bar Association rules of Professional Conduct. (underlining added)

Rule 3.7 - Lawyer as a Witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a

necessary witness \* \* \* \*

Comment

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the

basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness

should be taken as proof or as an analysis of the proof.

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**From:** Austin Randazzo <Austin.Randazzo@fcc.gov>

**To:** Warren Havens <warren.havens@sbcglobal.net>; Mary Gosse <Mary.Gosse@fcc.gov>

**Cc:** "rjk@telcomlaw.com" <rjk@telcomlaw.com>; Richard Sippel <Richard.Sippel@fcc.gov>; 'Albert J. Catalano' <ajc@catalanoplache.com>; Brian Carter <Brian.Carter@fcc.gov>; 'Charles A. Zdebski' <czdebski@eckertseamans.com>; Gary Schonman <Gary.Schonman@fcc.gov>; 'Harry F. Cole' <cole@fhhlaw.com>; 'Howard M. Liberman' <Howard.Liberman@dbr.com>; 'Jack Richards' <richards@khlaw.com>; 'James M. Chen' <jim@jimchen.org>; 'Jeffrey L. Sheldon' <jsheldon@lb3law.com>; 'Jimmy Stobaugh' <jstobaugh@telesaurus.com>; 'Joshua S. Turner' <jturner@wileyrein.com>; 'Kurt E. DeSoto' <kdesoto@wileyrein.com>; 'Laura H. Phillips' <Laura.Phillips@dbr.com>; 'Matthew J. Plache' <mjp@catalanoplache.com>; Pamela Kane <Pamela.Kane@fcc.gov>; 'Patricia J. Paoletta' <tpaoletta@wiltshiregrannis.com>; 'Patrick R. McFadden' <Patrick.McFadden@dbr.com>; 'Paul J. Feldman' <feldman@fhhlaw.com>; 'Robert G. Kirk' <rkirk@wblaw.com>; 'Robert J. Jackson' <rhj@commlawgroup.com>; 'Robert M. Gurss' <gurss@fhhlaw.com>; 'Tamir Damari' <tdamari@nossaman.com>; Terry Cavanaugh <Terry.Cavanaugh@fcc.gov>; 'Wes Wright' <wright@khlaw.com>

**Sent:** Tuesday, March 19, 2013 5:21 AM

**Subject:** RE: FCC/OALJ rquest for information

Thank you, Mr. Havens. Those documents will be helpful.

**Austin Randazzo**

**Attorney Advisor-Law Clerk**

**Office of Administrative Law Judges**

**Federal Communications Commission**

**(202) 418-2280**

---

**From:** Warren Havens [mailto:warren.havens@sbcglobal.net]

**Sent:** Monday, March 18, 2013 6:30 PM

**To:** Mary Gosse

**Cc:** rjk@telcomlaw.com; Richard Sippel; Austin Randazzo; 'Albert J. Catalano'; Brian Carter; 'Charles A. Zdebski'; Gary Schonman; 'Harry F. Cole'; 'Howard M. Liberman'; 'Jack Richards'; 'James M. Chen'; 'Jeffrey L. Sheldon'; 'Jimmy Stobaugh'; 'Joshua S. Turner'; 'Kurt E. DeSoto'; 'Laura H. Phillips'; 'Matthew J. Plache'; Pamela Kane; 'Patricia J. Paoletta'; 'Patrick R. McFadden'; 'Paul J. Feldman'; 'Robert G. Kirk'; 'Robert J. Jackson'; 'Robert M. Gurss'; 'Tamir Damari'; Terry Cavanaugh; 'Wes Wright'; Warren Havens

**Subject:** Re: FCC/OALJ rquest for information

Ms. Gosse,

I am not at my regular office today with files, but I can respond and provide documents indicated. I will be at my regular office later tomorrow.

I will attempt that tomorrow, and have put in a request to my office support staff, and to also check with counsel in the NJ action. If you have contrary instructions, please let me know.

The documentary information shows what I described, that Maritime objected to Mr. Chen as I wrote. Under DC Bar rules, the Maritime assertion of conflict is an objection. I will cite the rule, along with the passage in the Maritime documentary information. While I cannot get into attorney-client confidential communications, it is clear that Maritime was seeking to disqualify fully or substantially Mr. Chen, and discharging him in the FCC proceeding was the only prudent step I could take. My asserting pro se rights has a basis in the HDO, FCC 11-64, and the proceedings leading to it, and other basis as well.

Warren Havens

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**From:** Bob Keller <[rjk@TelComLaw.com](mailto:rjk@TelComLaw.com)>  
**To:** 'Mary Gosse' <[Mary.Gosse@fcc.gov](mailto:Mary.Gosse@fcc.gov)>  
**Cc:** 'Richard Sippel' <[Richard.Sippel@fcc.gov](mailto:Richard.Sippel@fcc.gov)>; 'Austin Randazzo' <[Austin.Randazzo@fcc.gov](mailto:Austin.Randazzo@fcc.gov)>; 'Albert J. Catalano' <[ajc@catalanoplache.com](mailto:ajc@catalanoplache.com)>; 'Brian Carter' <[Brian.Carter@fcc.gov](mailto:Brian.Carter@fcc.gov)>; 'Charles A. Zdebski' <[czdebski@eckertseamans.com](mailto:czdebski@eckertseamans.com)>; 'Gary Schonman' <[Gary.Schonman@fcc.gov](mailto:Gary.Schonman@fcc.gov)>; 'Harry F. Cole' <[cole@fhhlaw.com](mailto:cole@fhhlaw.com)>; 'Howard M. Liberman' <[Howard.Liberman@dbr.com](mailto:Howard.Liberman@dbr.com)>; 'Jack Richards' <[richards@khlaw.com](mailto:richards@khlaw.com)>; 'James M. Chen' <[jim@jimchen.org](mailto:jim@jimchen.org)>; 'Jeffrey L. Sheldon' <[jsheldon@lb3law.com](mailto:jsheldon@lb3law.com)>; 'Jimmy Stobaugh' <[jstobaugh@telesaurus.com](mailto:jstobaugh@telesaurus.com)>; 'Joshua S. Turner' <[jturner@wileyrein.com](mailto:jturner@wileyrein.com)>; 'Kurt E. DeSoto' <[kdesoto@wileyrein.com](mailto:kdesoto@wileyrein.com)>; 'Laura H. Phillips' <[Laura.Phillips@dbr.com](mailto:Laura.Phillips@dbr.com)>; 'Matthew J. Plache' <[mjp@catalanoplache.com](mailto:mjp@catalanoplache.com)>; 'Pamela Kane' <[Pamela.Kane@fcc.gov](mailto:Pamela.Kane@fcc.gov)>; 'Patricia J. Paoletta' <[tpaoletta@wiltshiregrannis.com](mailto:tpaoletta@wiltshiregrannis.com)>; 'Patrick R. McFadden' <[Patrick.McFadden@dbr.com](mailto:Patrick.McFadden@dbr.com)>; 'Paul J. Feldman' <[feldman@fhhlaw.com](mailto:feldman@fhhlaw.com)>; 'Robert G. Kirk' <[rkirk@wblaw.com](mailto:rkirk@wblaw.com)>; 'Robert J. Jackson' <[rhj@commlawgroup.com](mailto:rhj@commlawgroup.com)>; 'Robert M. Gurs' <[gurs@fhhlaw.com](mailto:gurs@fhhlaw.com)>; 'Tamir Damari' <[tdamari@nossaman.com](mailto:tdamari@nossaman.com)>; 'Terry Cavanaugh' <[Terry.Cavanaugh@fcc.gov](mailto:Terry.Cavanaugh@fcc.gov)>; 'Warren C. Havens' <[warren.havens@sbcglobal.net](mailto:warren.havens@sbcglobal.net)>; 'Wes Wright' <[wright@khlaw.com](mailto:wright@khlaw.com)>  
**Sent:** Monday, March 18, 2013 2:56 PM  
**Subject:** RE: FCC/OALJ request for information

Ms. Gosse,

If anyone has responded to your email message on behalf of Mr. Havens, I have not yet been served with it, so I am left to speculate what "objection" he is referring to.

I have checked with Maritime's legal counsel in the New Jersey proceeding to confirm what was stated previously, i.e., that Maritime has never objected to Mr. Chen's role as an expert in the New Jersey matter. I am attaching to this email the only Maritime filing in New Jersey that even remotely touches on this issue. In a January 24, 2013, brief opposing the pro hac vice admission of one Stephen L. Zelinger as counsel for Mr. Havens and the SkyTel entities, Maritime raised concerns about potential delay from entry of a new attorney. In that context, Maritime recited the history of the sequential retention and successive termination of various counsel for Havens in the FCC proceedings, including Mr. Chen as the most recent. It was simply mentioned that Mr. Chen, in addition to having recently entered an appearance in the FCC proceeding, "also serves as certain of Plaintiffs' expert in other proceedings, a clear conflict." The noted conflict of interest is relevant to the weight and credibility to be afforded to any expert opinion testimony given by Mr. Chen in the New Jersey proceeding, but it does not constitute an objection to Mr. Chen's role as an expert. Again, that pleading was not directed at Mr. Chen, but was rather in opposition to the pro hac vice admission of Mr. Zelinger.

Mr. Chen has recently been deposed in the New Jersey proceeding and will presumably be called by Havens as an expert witness if there is a trial. To be clear and unequivocal, Maritime has not objected to or otherwise sought the disqualification of Mr. Chen as an expert witness in the New Jersey proceeding. Mr. Havens is falsely claiming that there was such an objection in an improper effort to justify his resumption of

prohibited pro se activities.

--

Bob Keller <[rjk@telcomlaw.com](mailto:rjk@telcomlaw.com)>  
Law Offices of Robert J. Keller, P.C.  
P.O. Box 33428  
Washington, D.C. 20033-0428  
202.223.2100

---

**From:** Bob Keller [<mailto:rjk@TelComLaw.com>]

**Sent:** Monday, March 18, 2013 1:26 PM

**To:** 'Mary Gosse'

**Cc:** 'Richard Sippel'; 'Austin Randazzo'; 'Albert J. Catalano'; 'Brian Carter'; 'Charles A. Zdebski'; 'Gary Schonman'; 'Harry F. Cole'; 'Howard M. Liberman'; 'Jack Richards'; 'James M. Chen'; 'Jeffrey L. Sheldon'; 'Jimmy Stobaugh'; 'Joshua S. Turner'; 'Kurt E. DeSoto'; 'Laura H. Phillips'; 'Matthew J. Plache'; 'Pamela Kane'; 'Patricia J. Paoletta'; 'Patrick R. McFadden'; 'Paul J. Feldman'; 'Robert G. Kirk'; 'Robert J. Jackson'; 'Robert M. Gurss'; 'Tamir Damari'; 'Terry Cavanaugh'; 'Warren C. Havens'; 'Wes Wright'

**Subject:** RE: FCC/OALJ rquest for information

**Importance:** High

Ms. Gosse,

Warren Havens asserts that that such an objection was made, but does not provide a date or any other identifying information. It is thus up to him to produce a copy of the referenced item.

Maritime maintains what it has already stated on this point, namely, Maritime did NOT object to Mr. Chen's being presented as an expert witness in the New Jersey proceeding, but merely noted his dual role as expert witness in New Jersey (and in the Bankruptcy proceeding) and FCC counsel in the hearing matter.

--

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---

**From:** Mary Gosse [<mailto:Mary.Gosse@fcc.gov>]

**Sent:** Monday, March 18, 2013 10:28 AM

**To:** Albert J. Catalano; Brian Carter; Charles A. Zdebski; Gary Schonman; Harry F. Cole; Howard M. Liberman; Jack Richards; James M. Chen; Jeffrey L. Sheldon; Jimmy Stobaugh; Joshua S. Turner; Kurt E. DeSoto; Laura H. Phillips; Matthew J. Plache; Pamela Kane; Patricia J. Paoletta; Patrick R. McFadden; Paul J. Feldman; Robert G. Kirk; Robert J. Jackson; Robert J. Keller; Robert M. Gurss; Tamir Damari; Terry Cavanaugh; Warren C. Havens; Wes Wright

**Cc:** Richard Sippel; Austin Randazzo

**Subject:** FCC/OALJ rquest for information

Counsel,

On page 1 of his February 1, 2013 *Motion to Dismiss*, Warren Havens referenced a filing made by Maritime Communications/Land Mobile, LLC in the New Jersey antitrust proceeding that he alleges to contain objections to Mr. Chen's participation in the proceeding over which Judge Sippel presides. On

page 3 of its own February 6, 2013 *Motion to Strike*, Maritime asserts that the filing contains no such objections.

The Presiding Judge requests that he be provided with a copy of that filing as quickly as possible.

Thank you.

Mary Gosse, AO  
FCC/OALJ  
RM 1C831  
Washington, DC  
202 418-2299  
FAX: 202 418-0195  
E-Mail: [mary.gosse@fcc.gov](mailto:mary.gosse@fcc.gov)

Warren Havens to FCC OALJ

March 21, 2013

This is the: First Attachment to my responsive email of 3.21.13.

First below is this Order rejecting the Maritime Opposition.

Second below is the Opposition by Maritime that contained the Jim Chen issue Maritime raised.

Finally below is a filing identifying this pro hac vice matter.

Respectfully,  
W. Havens

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

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**WARREN HAVENS, ET AL.,**

**Plaintiffs,**

**v.**

**MOBEX COMMUNICATIONS, INC.,  
ET AL.,**

**Defendants.**

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**Civil Action No. 11-993 (KSH)**

**ORDER**

This matter having come before the Court by way of motion of plaintiffs for the pro hac  
vice admission of Steven L. Zelinger;

and the Court being advised that the defendant MCLM intends to oppose the motion,  
Richards Affidavit ¶¶ 8-9, ECF No. 134;

and the Court having recently granted an extension of the fact discovery deadline based  
upon the representation that logistical issues have arisen that impacted the parties' ability to  
complete depositions that will mostly occur in California, ECF Nos. 132 & 135;

and the motion reflecting that the admission is sought to conduct depositions in  
California, ECF No. 134-1 at 7;

and the Court seeking to ensure that the motion for pro hac vice admission does not delay  
the parties' ability to complete the depositions by the recently extended deadline;

and the Court therefore expediting the deadline for the submission of the opposition and  
reply briefs and the return date;

and these deadlines superseding the Clerk's entries on the docket concerning the motion;

IT IS THEREFORE ON THIS 22nd day of January, 2013

ORDERED that any opposition to the motion for pro hac vice admission shall be submitted no later than **January 24, 2013 at noon** and any reply shall be submitted no later than **January 28, 2013 at noon**. The motion shall be decided without oral argument pursuant to Fed. R. Civ. P. 78 and L. Civ. R. 78.1;

IT IS FURTHER ORDERED that these deadlines supersede the Clerk's entries on the docket concerning the motion; and

IT IS FURTHER ORDERED that all other deadlines shall remain in full force and effect.

s/Patty Shwartz  
**UNITED STATES MAGISTRATE JUDGE**



Note by W. Havens to FCC OALJ.

See p. 4 below.

Also, this Opposition was denied. See Order above.

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

SKYBRIDGE SPECTRUM FOUNDATION, a  
Delaware nonprofit corporation; WARREN C.  
HAVENS, an individual; TELESARUS  
VPC, LLC, a Delaware Limited Liability  
Company; AMTS CONSORTIUM, LLC, a  
Delaware Limited Liability Company;  
INTELLIGENT TRANSPORTATION &  
MONITORING, LLC, a Delaware Limited  
Liability Company; and TELESARUS  
HOLDINGS GB, LLC, a Delaware Limited  
Liability Company,

Plaintiffs,

v.

MOBEX NETWORK SERVICES, LLC, a  
Delaware Limited Liability Company;  
MARITIME COMMUNICATIONS/LAND  
MOBILE, LLC, a Delaware Limited Liability  
Company, PAGING SYSTEMS, INC., a  
California corporation; TOUCH TEL  
CORPORATION, a California corporation,  
and DOES 1-100,

Defendants.

Civil Action No. 2:11-CV-00993-KSH-PS

Motion Returnable:  
February 19, 2013

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DEFENDANT MARITIME COMMUNICATIONS/LAND MOBILE, LLC'S BRIEF IN  
OPPOSITION TO PLAINTIFFS' MOTION FOR  
*PRO HAC VICE* ADMISSION OF STEPHEN L. ZELINGER, ESQ.

---

Robert W. Mauriello, Jr., Esq.  
GRAHAM CURTIN  
A Professional Association  
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PRELIMINARY STATEMENT

Defendant Maritime Communications/Land Mobile, LLC ("Maritime") submits this brief in opposition to Plaintiffs Warren Havens, Skybridge Spectrum Foundation, Telesaurus VPC, LLC, AMTS Consortium, LLC, Intelligent Transportation & Monitoring Wireless, LLC, and Telesaurus Holdings GB, LLC's (collectively, "Plaintiffs") motion for *pro hac vice* admission of Stephen L. Zelinger, Esq ("Zelinger").

With the close of discovery rapidly approaching, Plaintiffs now seek to admit *pro hac vice* Zelinger, a California attorney who does not appear to be affiliated with any law firm, without explanation as to why his services are necessary to this litigation in New Jersey. From the face of his curriculum vitae, there is nothing to suggest that Zelinger has any particular expertise concerning the sole Sherman Antitrust §1 claim in this action or even has experience with the Federal Communications Commission ("FCC"), telecommunications, let alone a history of representing Plaintiffs. Moreover, there is nothing in Plaintiffs' application to this Court that alleges their current counsel is unable to adequately represent their interests or that there is some gap in their representation that Zelinger is being retained to fill – instead, this appears, at least to Maritime, yet another stage in Plaintiffs' campaign to add complexity and delay to the resolution of this action.

Admission of Zelinger will delay this action in two ways: (1) given Plaintiffs' history in other actions, Maritime anticipates that Zelinger will only be the first in a long line of counsel to enter and exit this litigation – Plaintiffs have hired and fired no fewer than four counsel in the FCC and Bankruptcy Actions, including the retention of one of their expert witnesses in this action as Plaintiffs' counsel in the FCC Action – leaving behind a wake of delays that will only serve to stall the inevitable dismissal of Plaintiffs' meritless remaining cause of action; and (2) without Zelinger, scheduling in this litigation has already been tortured but

with him located on the other side of the country and apparently currently employed by at least five companies (including one he co-founded), moving the calendar forward will certainly become a colossal effort.

Plaintiffs' motion should be seen for what it really is – a transparent attempt by Plaintiffs to use its superior financial position and ability to retain multiple counsel in order to further delay resolution of Plaintiffs' spurious Sherman Act claim and to delay Maritime's anticipated motion for summary judgment in this action to dismiss that single claim with prejudice. Accordingly, and for the reasons set forth below, Plaintiffs' motion for *pro hac vice* admission of Zelinger should be denied.

### ARGUMENT

#### I. PLAINTIFFS' MOTION FOR *PRO HAC VICE* ADMISSION OF STEPHEN L. ZELINGER, ESQ. SHOULD BE DENIED

While Maritime recognizes that *pro hac vice* motions are typically granted (and it is this Firm's typical practice to routinely consent to such an application), the case law from this District makes equally clear that "the court has wide discretion in determining the admission of out-of-state attorneys." *Thoma v. A.H. Robins Co.*, 100 F.R.D. 344, 348 (D.N.J. 1983) (denying admission where movant had continually impeded the proceedings and would not be prejudiced by representation by its local counsel); L. Civ. R. 101.1(c)(1) (applications may be granted "in the discretion of the Court"). But "[a]dmission *pro hac vice* is a privilege, not a right." *Mruz v. Caring, Inc.*, 107 F. Supp. 2d 596, 602 (D.N.J. 2000), *overruled on other grounds*, 166 F. Supp. 2d 61 (D.N.J. 2001); *see also Leis v. Flynt*, 439 U.S. 438, 441-42 (1979). Where delay of proceedings is a concern, this Court has denied *pro hac vice* admission. *See, e.g., Brown v. Fairleigh Dickinson Univ.*, 560 F. Supp. 391, 397 (D.N.J. 1983) (denying *pro hac vice* admission solely to ensure there would be no further delay where counsel substitution and withdrawal had

been an issue); *Thoma*, 100 F.R.D. at 348 (denying admission to counsel that had long been involved in the matter to avoid further delay).

Here, Plaintiffs did not seek to have counsel admitted *pro hac vice* at the outset of this action. To the contrary, Plaintiffs current counsel has conducted substantial written discovery, opposed defendants' motion to dismiss, and propounded close to 300 third-party subpoenas. Perhaps more importantly, Plaintiffs' current counsel is an experienced New Jersey law firm that has numerous trial lawyers at its disposal and extensive experience in this Court. Plaintiffs would be hard-pressed to argue that their current counsel cannot adequately continue to represent their interests in this action. Rather, Plaintiffs attempt to delay the ultimate resolution of this action (keeping the specter of this lawsuit hanging over Maritime's efforts to complete the Bankruptcy Action and resolve the FCC Action) has manifested itself in Plaintiffs' (1) serial attempts to amend their Complaint; (2) propounding of irrelevant written discovery; (3) issuance of hundreds of abusive subpoenas to harass and interfere with virtually all of Maritime's business relationships; and (4) refusal to schedule depositions.<sup>1</sup> Here, as in the *Brown* case cited above, Plaintiffs' next delay tactic is the introduction of new attorneys that Plaintiffs will seek to have admitted *pro hac vice* only to have them bow out a short time later. Plaintiffs have clearly demonstrated this delay tactic in the other actions involving Maritime.

For example, in the FCC action, Plaintiffs have been represented by no fewer than four firms in fewer than two years and attempted to proceed *pro se* for a significant and disruptive period of time. Starting in 2011, Nossman, LLP represented Plaintiffs, followed by:

- Nossman's withdrawal in or about May 2011 (just after the FCC hearing began);

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<sup>1</sup> Maritime provided a number of dates for the deposition of its witnesses and Plaintiffs refused all of them. (See Exhibit A).

- Drinker Biddle's appearance in or about June 2011;
- Drinker Biddle's withdrawal in or about January 2012;
- Robert Jackson, Esq.'s appearance for some of Plaintiffs in or about March 2012;
- Warren Havens' *pro se* representation of himself and remainder of Plaintiffs, despite the Administrative Law Judge's repeated orders to obtain counsel;
- Robert Jackson, Esq.'s withdrawal in or about September 2012; and
- James Chen, Esq.'s appearance in or about November 2012 (James Chen also serves as certain of Plaintiffs' expert in other proceedings, a clear conflict).



This revolving door of counsel has delayed the FCC proceeding and a similar appearance-withdrawal pattern is present in the Bankruptcy Action as well.

For these reasons – and there is no explanation as to why another attorney is necessary for Plaintiffs' prosecution of their singular Sherman Act claim – Maritime respectfully requests that this Court deny Plaintiffs' *pro hac vice* motion or, in the alternative, at least impose restrictions on Plaintiffs that will curb their penchant for switching counsel and causing delay.

#### CONCLUSION

For the foregoing reasons, Maritime respectfully requests that Plaintiffs' motion for *pro hac vice* admission of Stephen L. Zelinger, Esq. be denied in its entirety or, alternatively, be granted with restrictions tailored to prevent further delay.

GRAHAM CURTIN, P.A.  
Attorneys for Defendants  
Maritime Communications/Land Mobile, LLC

By: s/ Robert W. Mauriello, Jr.  
Robert W. Mauriello, Jr.

Dated: January 24, 2013

Winne, Banta, Hetherington, Basralian & Kahn, P.C.  
Robert M. Jacobs, Esq. (RMJ0773)  
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21 Main St., Court Plaza South  
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Note by W. Havens to FCC OALJ.  
I include this to show identify this pro hac  
vice matter.

Counsel for Plaintiffs  
Skybridge Spectrum Foundation,  
Warren C. Havens, Telesaurus VPC, LLC,  
AMTS Consortium, LLC, Intelligent Transportation &  
Monitoring Wireless, LLC, and  
Telesaurus Holdings GC, LLC

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

SKYBRIDGE SPECTRUM FOUNDATION, a  
Delaware nonprofit corporation, WARREN C.  
HAVENS, an individual; TELESaurus VPC,  
LLC, a Delaware Limited Liability Company;  
AMTS CONSORTIUM, LLC, a Delaware  
Limited Liability Company;  
INTELLIGENT TRANSPORTATION  
& MONITORING WIRELESS, LLC, a Delaware  
Limited Liability Company; and  
TELESaurus HOLDINGS GB, LLC., a  
Delaware Limited Liability Company,

Plaintiffs,

vs.

MOBEX NETWORK SERVICES, LLC, a  
Delaware Limited Liability Company; MOBEX  
COMMUNICATIONS, INC., a Delaware  
corporation, MARITIME COMMUNICATIONS /  
LAND MOBILE, LLC, a Delaware Limited  
Liability Company, PAGING SYSTEMS, INC., a  
California corporation; TOUCH TEL  
CORPORATION, a California corporation, and  
DOES 1-100,

Defendants.

Civil Action No.: 11-993-KSH-PS

**AFFIDAVIT OF R. N. TENDAI RICHARDS  
IN SUPPORT OF MOTION FOR *PRO HAC*  
VICE ADMISSION OF STEVEN L.  
ZELINGER**

R. N. Tendai Richards, of full age, upon his certification says:



1 I am an attorney at law licensed to practice and duly admitted in the State of New Jersey  
2 and am associated with the firm Winne, Banta, Hetherington, Basralian & Kahn, P.C., attorneys for  
3 plaintiffs in the within matter. I make this Certification as local counsel in support of the application,  
4 pursuant to Fed.R.Civ.Proc. 78 and Local Civil Rule 101.1 (c), to admit Steven Zelinger, Esq. *pro hac*  
5 *vice* as counsel for plaintiffs in the within matter.

6  
7 2. Mr. Zelinger is an attorney at law of the State of California. Mr. Zelinger has an  
8 attorney-client relationship with the plaintiffs and is fully conversant with the facts and issues involved  
9 in this action. The plaintiffs wish to be represented by Mr. Zelinger in this matter.

10 3. My firm, Winne, Banta, Hetherington, Basralian & Kahn, P.C., will act as counsel of  
11 record for the plaintiffs in the within matter. Each of the attorneys of this office is authorized to practice  
12 law pursuant to R. 1:21-1. Pursuant to the terms of Fed.R.Civ.Proc. 78 and Local Rule 101.1(c), if the  
13 motion to permit Mr. Zelinger to appear *pro hac vice* is granted, Winne, Banta, Hetherington, Basralian  
14 & Kahn, P.C. will sign all papers and be responsible for the conduct of all proceedings.

15 4. I further certify that I will be responsible for the conduct of Mr. Zelinger upon his  
16 admission *pro hac vice*.

17 5. I further agree to continue to make all necessary court appearances as local counsel.

18 6. Finally, as local counsel I will insure that Mr. Zelinger will comply with the requirements  
19 of Local Civil Rule 101.1(c).

20 7. Counsel for Defendants Paging Systems, Inc. and Touch Tel Corp. has no objection to  
21 the *pro hac vice* admission of Mr. Zelinger. Annexed hereto as Exhibit "A" is an e-mail, dated January  
22 16, 2013, from Kenneth Friedman to myself and Robert Mauriello, counsel for Defendant Maritime  
23 Communications/Land Mobile, LLC ("MCLM"), indicating its consent to Mr. Zelinger's *pro hac vice*  
24 admission.

25 8. However, counsel for MCLM has unreasonably and in bad faith withheld its consent to  
26 Mr. Zelinger's *pro hac vice* admission. As evident from the attached e-mail from Mr. Mauriello, there  
27 simply is no justifiable basis upon which to either object to the *pro hac vice* admission of Mr. Zelinger  
28

1 or for this Court to deny his requested admission. Annexed hereto as Exhibit "B" is an e-mail, dated  
2 January 14, 2013 from Robert Mauriello, indicating his refusal to consent to Mr. Zelinger's *pro hac vice*  
3 admission.

4 9. That Mr. Mauriello's objection is unreasonable and unfounded is evident from the fact  
5 that Defendants Paging Systems, Inc. and Touch Tel Corp., whose witnesses are to be deposed in  
6 California, consent to the admission of Mr. Zelinger, and said non-party witnesses cannot be compelled  
7 to be deposed in the State of New Jersey. MCLM does not have any witnesses being deposed in  
8 California, has not issued any deposition notices at all, and was only planning to appear telephonically at  
9 the California depositions in any event.  
10

11 I hereby certify that the foregoing statements made by me are true. I am aware that if the  
12 foregoing statements made by me are willfully false, I am subject to punishment.  
13  
14

15 By: s/ R. N. Tendai Richards  
16 R. N. Tendai Richards  
17 Winne, Banta, Hetherington,  
18 Basralian & Kahn, P.C.  
19 21 Main Street, Court Plaza South  
20 Hackensack, NJ 07601  
21 (201) 487-38  
22 Attorneys for Plaintiffs  
23  
24  
25  
26  
27  
28

Dated: January 17, 2013

# Exhibit A

**Richards, R.N. Tendai**

---

**From:** Friedman, Kenneth [KFriedman@manatt.com]  
**Sent:** Wednesday, January 16, 2013 2:28 PM  
**To:** Richards, R.N. Tendai; Robert Mauriello  
**Cc:** Hahm, Eugene  
**Subject:** RE: Skybridge Spectrum Foundation, et al. v. Mobex Network Services, et al.  
**Attachments:** Letter to MJ seeking additional time (2) DOC

Tendai: The revised version of the letter is attached, reflecting your clients' request that dates be extended for six weeks as opposed to the one month tentatively agreed yesterday evening.

Rob: we have consented to this request, as reflected in the attached letter. Also, and fyi, we have reviewed Mr. Zelinger's records and found no conflict that would prevent him from representing plaintiffs in this action. As such, we have consented to his admission phv.

Please confirm that I can submit the attached letter to Magistrate Shwartz at your earliest convenience.

Thanks,  
KDF

---

**From:** Richards, R.N. Tendai [mailto:TRICHARDS@winnebanta.com]  
**Sent:** Tuesday, January 15, 2013 6:21 PM  
**To:** Friedman, Kenneth; Robert Mauriello  
**Cc:** Hahm, Eugene  
**Subject:** RE: Skybridge Spectrum Foundation, et al. v. Mobex Network Services, et al.

I will try. I have to be at a hearing before the Washington Township zoning board at 8:00 tonight to cross examine a traffic expert of all things, but I will continue to see what I can get done.

Tendai

**From:** Friedman, Kenneth [mailto:KFriedman@manatt.com]  
**Sent:** Tuesday, January 15, 2013 6:20 PM  
**To:** Richards, R.N. Tendai; Robert Mauriello  
**Cc:** Hahm, Eugene  
**Subject:** RE: Skybridge Spectrum Foundation, et al. v. Mobex Network Services, et al.

I am going to be here for a few hours more this evening. Our staff is standing by, so I would greatly appreciate it if you keep trying for approval tonight.

As for your changes, you are correct on both counts, thanks for the catch. A revised version of the letter, correcting both dates, is attached.

Thanks,  
KDF

Kenneth D. Friedman  
Manatt Phelps & Phillips, LLP  
7 Times Square, 23rd Floor  
New York, New York 10036  
Tel (212) 830-7184  
Fax (212) 830-3012

CONFIDENTIALITY NOTICE: This e-mail and any files transmitted with it are confidential and intended only for the individual(s) named. If you have received this e-mail by mistake, please do not print, copy, retransmit, disseminate, or otherwise use the information contained herein. If you are not the named addressee, please notify the sender by e-mail and delete the message from your system. If you are not the named addressee, please do not print, copy, retransmit, disseminate, or otherwise use the information contained herein.

# Exhibit B



**Richards, R.N. Tendai**

---

**From:** Robert Mauriello [rmauriello@grahamcurtin.com]  
**Sent:** Monday, January 14, 2013 5:07 PM  
**To:** Richards, R.N. Tendai; Friedman, Kenneth; Hahm, Eugene  
**Subject:** RE: Skybridge: Steven Zelinger

Tendai-

I am not inclined to consent -- it seems to me that you are perfectly capable of handling the California depositions (or we could hold them here in NJ, which is my preference since I will have to participate telephonically). Again, I am willing to discuss it but I do not see a reason for adding new counsel to this litigation at this late stage.

Talk to you tomorrow.

Rob

Robert W. Mauriello, Jr.  
GRAHAM CURTIN, P.A.  
(973) 401-7119 -- Direct Dial

---

**From:** Richards, R.N. Tendai [mailto:TRICHARDS@winnebanta.com]  
**Sent:** Monday, January 14, 2013 4:37 PM  
**To:** Friedman, Kenneth; Robert Mauriello; Hahm, Eugene  
**Subject:** Skybridge: Steven Zelinger

Counsel,

I spoke briefly with Ken Friedman and am now running out the door, but wanted to send this email first. I am looking to have Steven Zelinger admitted Pro Hac Vice in this matter. Initially he will help with the upcoming California depositions and end run of the discovery issues. I am seeking your consent. To that end, I have attached his CV. Please respond and let me know. I believe we are on for 3:00 tomorrow for our "meet and confer" and that Ken will be sending around call in information. Ken -- he was with Manatt in DC: white collar crime so no conflict or issue that I can see.

Tendai



**Tendai Richards, Esq.**

**Winne, Banta, Hetherington, Basralian & Kahn, P.C. | visit us at WinneBanta.com**

Court Plaza South - East Wing - Suite 101

21 Main Street, Hackensack, New Jersey 07601

Direct 201.562.1099 | Firm 201.487.3800 | Fax 201.487.8529 | [trichards@winnebanta.com](mailto:trichards@winnebanta.com)

Legal Assistant: Lourdes Diaz

Tel. 201.487-3800 ext.1027 | [ldiaz@winnebanta.com](mailto:ldiaz@winnebanta.com)

This message contains confidential and proprietary information of the sender, and is intended only for the person(s) to whom it is addressed and may contain information that is legally privileged and confidential. Any use, distribution, copying or disclosure by any other person is strictly

**STEVEN L. ZELINGER**

1170 University Ave.  
Palo Alto, CA 94025

Mobile (650) 438-3434  
stevezelinger@aol.com  
Steve.Zelinger@gmail.com

**PROFESSIONAL EXPERIENCE**

**CURRENT AND ADVISORY POSITIONS**

**SWEETSPOT, INC., PALO ALTO, CA ([www.sweetspot-wifi.com](http://www.sweetspot-wifi.com))**

**May 2008-PRESENT**

ADVISOR, BOARD MEMBER, CO-FOUNDER

- ◆ Providing strategic, business, financing and legal advice to early-stage company delivering to consumers' smart phones at the purchase point of decision, brands' and retailers' customized content, coupons, discounts, loyalty and payment options via proprietary Wi-Fi browser-based solution.

**SHIFT SYSTEMS, LLC, SAN FRANCISCO, CA & RENO, NV ([www.shiftsys.com](http://www.shiftsys.com); [www.shiftresearch.com](http://www.shiftresearch.com))**

ADVISOR

**Sept. 2008-PRESENT**

- ◆ Providing strategic, legal, financing, regulatory and legislative advice to early-stage cloud-computing and cybersecurity company, designated by the Federal Energy Regulatory Commission (FERC) as Authorized Certification Authority (i.e., gatekeeper) to certify and authenticate US energy grid participants and validate their grid and online access and compliance with SHIFT's cybersecurity protocols.

**BLINGNATION and LEMON.COM, PALO ALTO, CA ([www.lemon.com](http://www.lemon.com))**

**Mar. 2008-PRESENT**

ADVISOR

- ◆ Providing strategic advice to innovative mobile and online, receipts and loyalty company.

**CARBON TRACING, PALO ALTO, CA ([www.carbontracing.com](http://www.carbontracing.com))**

**Feb. 2009-PRESENT**

ADVISOR

- ◆ Providing strategic, legal, regulatory and legislative advice to online start-up offering a global e-record financial database and platform for independent financial verification, market evaluations and rating services to monetize global carbon assets (credits, allowances and offsets).

**AXIOM, SAN FRANCISCO, CA ([www.axiomlaw.com](http://www.axiomlaw.com))**

**April 2012-PRESENT**

ATTORNEY

- ◆ Providing project-based legal advice and support to AXIOM's Fortune 100 clients, e.g., GE Healthcare (leading integration of recently-acquired Silicon Valley medical technology company), Blue Shield (providing privacy and other regulatory and compliance guidance).

**PAST POSITIONS**

**YOUR OFFERS.COM, PALO ALTO, LA & HARTFORD ([www.youroffers.com](http://www.youroffers.com))**

**April 2012-Nov. 2012**

INTERIM GENERAL COUNSEL, BOARD SECRETARY & ADVISOR

- ◆ Interim General Counsel leading the recent financing, and providing strategic, business and legal advice to founders and senior management, of next-generation personalized marketing and payments company bringing personalized discounts and offers to US consumers.

**BALANCE HEALTH CORPORATION, PALO ALTO & LA, CA**

**Mar. 2008-April 2012**

GENERAL COUNSEL

- ◆ General Counsel and member of senior management team of BHC and affiliates, a healthcare enterprise licensing to physicians and clinics a proprietary Software-as-a-Service (SaaS) end-to-end solution for onsite and online managed care of obesity and other chronic disease, including training, support, processes, medical protocols, regulatory compliance, web support, as well as



Steven L. Zelinger – C.V.

Page 2 of 3

production, marketing, distribution and sale of pharmaceutical and nutritional products. Provided strategic, legal, regulatory, structural, IP, litigation, securities, business and financial counsel to senior management, board and advisors.

**SOLIDUS NETWORKS, INC. d/b/a PAY BY TOUCH, SAN FRANCISCO, CA****2003-Mar. 2008****EVP, GENERAL COUNSEL & CORPORATE SECRETARY**

- ♦ General Counsel, member of senior management team, and Secretary to the Board of San Francisco-based Pay By Touch, a company with operations in the U.S., U.K., Singapore and Mexico, offering a patented front-end biometric-payments, loyalty, age-verification and identity authentication service as well as personalized marketing to retailers, financial services, health care and online providers, online PIN debit, and back-end payment processing through its subsidiaries, Pay By Touch Payment Solutions, LLC, and Pay By Touch Processing, Inc., as well as collateral services. Responsible for all legal and regulatory matters, including Intellectual Property, Trademark, litigation, corporate, securities, finance, M&A, contract, H/R, government regulation and international, including privacy, compliance and financial services. Providing strategic legal, regulatory, business and financial counsel as member of senior management team.

**VISA INTERNATIONAL****1998 –2002****SVP, SENIOR COUNSEL & GLOBAL CHIEF OF LITIGATION, REGULATORY, RISK, BRAND & PRODUCT AFFAIRS**

- ♦ Responsible for more than 90 percent of Visa International Legal Dept. budget, including management and direction of the Visa Patent and Insurance Portfolios, government and regulatory (US, non-US and cross-border), immigration and HR/EEO matters, and all Visa International and Inovant litigation.
- ♦ Provided strategic legal and business counsel on corporate initiatives and policies, new products, services and brand initiatives, and response to regulatory requirements, such as Sarbanes-Oxley, FCPA, OFAC, anti-money laundering statutes, Patriot Act, and antitrust/competition review.
- ♦ Counsel to Visa International business groups, including Visa Strategic Investment Portfolio, Visa International Global Brand Management Committee and Visa International Product Development Council, each of which must approve all new Visa products and services prior to Board adoption.
- ♦ Regularly reported to credit facility and rating agencies, and regularly counseled Visa International senior management, the Board, Regional (Generals) Counsel, and bank-members' counsel and boards.
- ♦ Designed and implemented Visa International Internet and e-commerce Operating Regulations, including new Operating Regulations governing Internet Gambling.
- ♦ Developed revenue-producing Intellectual Asset Management Program while managing Visa Patent Portfolio, including patent prosecution and successful defense against claims.
- ♦ Prevailed in --or settled below litigation-costs-- every Visa International litigation matter, including antitrust, consumer, e-commerce, business defamation, patent infringement, trademark, tax and international arbitration cases, and achieved favorable outcomes in diverse U.S. and non-U.S. criminal and tax inquiries and government regulatory (e.g., anti-money laundering, Patriot Act) and EEO/HR matters.

**MANATT, PHELPS & PHILLIPS, WASHINGTON, D.C.****1992 – 1998****PARTNER, WHITE COLLAR CRIMINAL DEFENSE, CIVIL LITIGATION, GOVERNMENT CONTRACTS AND COMMERCIAL PRACTICE GROUPS**

- ♦ Represented individuals and corporations through trial and appeal in federal and state courts as well as before the U.S. Congress, Cabinet Departments, regulatory agencies, and domestic and international arbitration panels on criminal, civil enforcement, administrative, investigative, business, antitrust, civil rights and employment matters.
- ♦ Litigated, negotiated and defended both civil and criminal claims against government-regulated industries, government contractors, and their officers and directors (e.g., healthcare and medical instrumentation providers' government contract fraud, bank and election fraud, campaign finance



Steven L. Zelinger - C.V.

Page 3 of 3

and national security violations, qui tam suits); led internal investigations, corporate counseling, and development and implementation of compliance programs.

- ◆ Provided effective Business, Legal and Government Relations counseling on international trade, antitrust, foreign asset control, international finance and project development (e.g., first hydroelectric plant in Cambodia), and other issues affecting the transnational conduct of business.
- ◆ Developed substantial client base, e.g., OLYMPUS America, VISA, US and non-US banks.

**U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.**

**1987 – 1992**

**SR. TRIAL ATTORNEY, FEDERAL PROGRAMS BRANCH**

**(SPECIAL ACHIEVEMENT AWARDS; OUTSTANDING PERFORMANCE RATINGS)**

- ◆ Successfully defended the United States as Lead Counsel through trial and appeal in civil cases such as the War Powers (Persian Gulf) cases, then-largest Employment Discrimination Action against federal government, challenges to U.S. treaties, international debt policy, actions by U.S. Departments and Agencies, and Bivens (constitutional tort) actions.
- ◆ Prosecuted violations of federal statutes such as Ethics in Government Act, Labor Election Acts, Consumer Safety Acts (e.g., NHTSA), and National Security Acts.

**BAKER & MCKENZIE, WASHINGTON D.C., RIO, AND BUENOS AIRES OFFICES**

**1985 – 1987**

**ASSOCIATE ATTORNEY**

- ◆ Litigation: defense and prosecution of cases in international trade, customs, trademark, human rights, administrative, Iranian claims tribunal, and international libel.
- ◆ Corporate: U.S. and non-U.S./Latin American based transactions, mergers and acquisitions, securities, public finance and credit facility, international debt restructuring, incorporations, corporate compliance and management, natural resources and intellectual property licensing.

**EDUCATION**

**Georgetown University Law Center and School of Foreign Service**

**May 1985**

**J.D. & M.S.F.S. (M.S. in Foreign Service), Joint Degree, with highest distinction**

**Honors**

Law Review, *Law & Policy in Int'l Bus.*, Lead Articles Editor, 1983-85.

Honors Masters Program in International Business Diplomacy, 1982-85.

Appellate Litigation Clinic, 1984-85.

**Harvard University**

**June 1981**

**A.B., magna cum laude (History of Science)**

**Honors**

Rhodes Scholarship Finalist, 1981.

Harry S. Truman Scholar, 1979 (full 4-year scholarship established by Congress).

U.S. Supreme Court, 1980: Intern to Administrative Asst. to Chief Justice Burger.

Harvard Krokodilloes. Business manager and tenor in singing group, 1979-81.

Harvard Glee Club, 1977-78.

**LANGUAGES**

Fluent in Spanish.

**BAR and COURT MEMBERSHIPS**

Member, DC & California Bars, numerous federal district & appellate courts, and US Supreme Court.

**Charitable, Not for Profit and Board Activities and Positions Available upon Request**

Warren Havens to FCC OALJ

March 21, 2013

This is the: Second Attachment to my responsive email of 3.21.13.

This is included for the reason stated at the end of my email.

I include the full documentation below, but only some is relevant:

- I mark with arrows this relevant information - see p. 6 of this entire document, and the referenced Exhibit B, one of my filings in this FCC Hearing in docket 11-71.

Re the following: Mannat is the law firm for two co-defendants of Maritime in this case (the case that I call the "Maritime Antitrust Case").

- Maritime and the other defendants coordinate counsel on most all matters, and generally submit joint pleadings.
- What I indicate below (and in my email of today to OALJ) has been asserted by all defendants in this case including Maritime, for many months.

However, what I indicate in my filing, the just noted Exhibit B below, is correct as to the law and the public interest, and the requirements of this Hearing under docket 11-71, in my understanding and based on the substantial law I cite.

Clearly in my view, evidence in a US court proceeding on validity or invalidity of FCC licenses, licensees, and actions thereunder, that is essential or material to FCC proceedings on those matters, should not be barred from the FCC proceedings: but that is the Maritime position.

Antitrust violation actions in US District Court as to FCC licensees and licenses, is also under the Communications Act, including 47 USC §§ 314 and 313. Similarly, violations of FCC law by FCC licensees and applicants, where that is engaged in with results that restrain interstate commerce and cause damages to competitors and the market, is subject of proper action in US District Courts under antitrust law.

While not all evidence of violation of FCC law is relevant to violation of antitrust law, some certainly is (as in the subject Maritime Antitrust Case). And violation of US antitrust law is relevant to FCC licensing decisions, shown in the case authority I cite in Exhibit B below, and in FCC licensing Forms 601 and 603 in asking, essentially, if the applicant has been found to have violated antitrust law.

Also, as I previously explained in this FCC Hearing, Mobex is already subject to a order of default with prejudice in this antitrust case. Mobex held all of the site-based licenses that are now in this FCC Hearing, and was charged in the antitrust case with falsely keeping and asserting in the market FCC licenses and stations that were not constructed and kept in operation as required in FCC rules, and which had thus auto terminated under those rules, and which thereby caused violation of the Sherman Act.

Respectfully,  
W. Havens

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

WARREN HAVENS, ET AL.

**Plaintiffs,**

**V.**

**MOBEX NETWORK SERVICES,  
ET AL.,**

**Defendants.**

• • • • •

**Civil Action No. 11-993 (KSH)**

## ORDER ON INFORMAL APPLICATION

This matter having come before the court by way of submission dated March 19, 2013,  
regarding the dispute concerning the deposition of Susan Cooper;

and the Court having considered the submission, claims, defenses, and governing law;

and for the reasons set forth in the Opinion delivered on the record on March 20, 2013;

IT IS ON THIS 20th day of March, 2013

ORDERED that the request to compel Susan Cooper to appear for a deposition is granted and the request for a protective order is denied. Said deposition shall be video-taped and breaks shall be given as needed to address the deponent's back issues. The break time shall not count toward the seven-hour deposition time. The deposition shall be completed no later than **April 12, 2013**. The parties shall take whatever steps that they deem warranted to secure a copy of the transcript of the deposition if it is needed to prepare the joint proposed final pretrial order which is due **April 22, 2013 at 3:00 p.m.**;

IT IS FURTHER ORDERED that the request for sanctions is denied; and

IT IS FURTHER ORDERED that all deadlines shall remain unchanged.

s/Patty Shwartz  
**UNITED STATES MAGISTRATE JUDGE**



**Kenneth D. Friedman**  
Manatt, Phelps & Phillips, LLP  
Direct Dial: (212) 830-7184  
Direct Fax: (212) 830-3012  
E-mail: kfriedman@manatt.com

March 19, 2013

Client-Matter: 40480-061

**VIA ECF**

The Honorable Patty Shwartz, U.S.M.J.  
United States District Court, District of New Jersey  
U.S. Post Office & Courthouse  
Federal Square, P.O. Box 999  
Newark, New Jersey 07101-0999

**Re: Havens, et al. v. Mobex Network Services, LLC, et al.**  
**Civil Action No. 2:11-cv-993 (KSH) (PS)**

Dear Magistrate Shwartz:

This law firm represents defendants Paging Systems, Inc. and Touch Tel Corp. (collectively, "Paging Systems") in the above-referenced action. In accordance with this Court's practices, Paging Systems respectfully requests that the Court accept this joint letter to resolve the parties' dispute regarding the deposition of Susan Cooper.

On March 1, 2013, the parties filed a joint letter regarding the scheduling of expert, party, and non-party depositions. (ECF No. 156.) As part of that letter, Paging Systems requested an opportunity to supplement the record with evidence demonstrating the physical condition of Mrs. Cooper (who is 72 years old) and to determine, if her examination were deemed necessary, whether a less burdensome means for obtaining the desired discovery ought to be employed. (*Id.*)

By Order filed on March 4, 2013 (ECF No. 157), this Court tentatively scheduled the deposition of Mrs. Cooper for March 20, 2013<sup>1</sup>, but provided that the deposition should proceed on that date "[o]nly if her health permits. If her health does not permit, defense counsel shall provide information concerning her condition so that the Court can set a different date or provide other relief." (*Id.* at 1.) In light of additional information received regarding Mrs. Cooper's physical condition and the reasons discussed herein, Paging Systems respectfully requests that the Court enter a protective order pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure (i) precluding the deposition of Mrs. Cooper; (ii) alternatively, limiting Mrs. Cooper's deposition to an examination on written questions; or (iii) if she is deposed at all, limiting the

---

<sup>1</sup> The Order also scheduled the deposition of David Kling to proceed on March 20, 2013; that deposition is proceeding on that date at the offices of Paging Systems' counsel in Palo Alto, California.



manatt | phelps | phillips

Honorable Patty Shwartz  
 March 19, 2013  
 Page 2

duration of the deposition and the scope of the examination to questions narrowly tailored to Plaintiffs' allegations of collusion and conspiracy associated with Plaintiffs' sole remaining claim under Section 1 of the Sherman Act.

**A. Mrs. Cooper's Deposition Will Be Unduly Burdensome & Cumulative**

I am informed that Mrs. Cooper suffers from an ongoing, serious back condition due to complications arising from a laminectomy, a surgical procedure to remove a portion of the vertebral bone. This condition causes Mrs. Cooper to experience significant pain and discomfort in her back when she is forced to sit in one place for extended periods of time. Attached as Exhibit A is a 2008 note from Mrs. Cooper's former physician, Dr. Philip Alper, describing Mrs. Cooper's condition, characterizing her "disability" as "permanent," and instructing that Mrs. Cooper cannot sit in one place for anything more than a short period of time. (*See* Exh. A.)

The Court has discretion to quash or modify requested discovery under Fed. R. Civ. P. 26(c) upon good cause shown in order to protect a party or person from "annoyance, embarrassment, oppression, or undue burden or expense . . ." Fed. R. Civ. P. 26(c)(1); *see also Ahrens v. Ford Motor Co.*, 340 F.3d 1142, 1147 (10th Cir. 2003) (observing that "discretion to quash a discovery request due to a witness's failing health or the overly burdensome nature of the request is well established, particularly where the information is believed to be obtainable from another source") (citations omitted).

Paging Systems submits that, in light of her physical condition, requiring Mrs. Cooper to sit for a seven hour deposition would be unduly burdensome, particularly in light of the Plaintiffs' allegations in this case. The crux of Plaintiffs' antitrust claims is that, in a conspiracy to restrain competition, the Defendants allegedly misrepresented the status of station construction for their AMTS licenses in FCC filings or otherwise refused to provide Plaintiffs with technical information regarding Defendants' AMTS stations. Pursuant to this Court's Order filed on March 4, 2013, Plaintiffs will be deposing Mrs. Cooper's husband, Robert Cooper, president of co-defendant Touch Tel Corp., as well as Touch Tel Corp.'s chief engineer, David Kling. As disclosed publicly in FCC filings, Touch Tel Corp is the entity that manages the business operations associated with Paging Systems Inc.'s AMTS licenses, including the operation and maintenance of its broadcast stations for AMTS radio spectrum. Those deponents would be most knowledgeable regarding the operation of Paging Systems' AMTS licenses at issue in this case, including any technical information regarding those operations.

The Court has discretion to preclude the deposition a high corporate official where the corporate official has no personal or unique knowledge of the facts and plaintiff has access to other agents better suited to provide information regarding the facts subject to discovery. *See Ford Motor Co. v. Edgewood Properties, Inc.*, 2011 WL 2517133 at \*3 (D.N.J. June 23, 2011)





manatt | phelps | phillips

Honorable Patty Shwartz  
 March 19, 2013  
 Page 3

(citing *Reif v. CAN*, 248 F.R.D. 448 (E.D. Pa. 2008)). Because compelling Mrs. Cooper's deposition would not only be unduly burdensome but also both cumulative and duplicative of the depositions of Messrs. Cooper and Kling, Paging Systems respectfully submits that good cause exists for a protective order pursuant to Fed. R. Civ. P. 26(c)(1)(A) precluding Plaintiffs from deposing Ms. Cooper. Alternatively, Paging Systems respectfully submits that good cause exists for a protective order under Fed. R. Civ. P. 26(c)(1)(C) limiting Ms. Cooper's deposition to an examination on written questions in order to spare her the substantial pain and discomfort of having to sit for an extended period of time.

**B. Even if the Court Orders a Personal Deposition, The Court Should Limit The Duration of Any Deposition to Two Hours and Restrict the Scope of The Examination.**

Paging Systems further requests that, to the extent Mrs. Cooper's personal deposition is compelled, the deposition be limited to two hours and the scope of the examination be strictly limited to questions regarding Plaintiffs' remaining claim in the case; that is, Plaintiffs' allegations of concerted activity in the form of AMTS spectrum warehousing in violation of Section 1 of the Sherman Act. As this Court previously noted in ruling on the parties' dispute over Plaintiffs' overbroad subpoenas issued in January 2013, "discovery is not relevant unless it pertains to an alleged anticompetitive conspiracy between MCLM and Paging Systems in the acquisition or use of AMTS licenses." February 11, 2013, Transcript of Recorded Opinion, p. 9:12-15. Good cause exists for such a limitation because Paging Systems reasonably anticipates that Plaintiffs intend to cultivate testimony from Mrs. Cooper regarding AMTS licensing issues, for potential use in a parallel proceeding before the FCC.

This is not the first time this issue has come before the Court. In October 2012, Defendants sought to quash Plaintiffs' third-party subpoenas because Defendants asserted that Plaintiffs' purpose was to improperly gather documents to use in an FCC proceeding. In its Order issued October 23, 2012, the Court stated that "documents produced pursuant to the subpoenas served upon non-parties shall be used for the purpose of this litigation only." (ECF No. 125 at 1.) In its accompanying opinion, the Court rightly recognized that "[t]he real concern is that plaintiffs may be attempting to use the subpoena power of this Court to secure information for use in the FCC proceedings" and noted that "That is a legitimate concern." (ECF No. 126 at 11.) The Court further stated that it was "greatly concerned that some of the evidence that might be secured here, would be used in a proceeding for which it was not intended" and that "[t]his Court's process is not to be used to gain an advantage in another proceeding." (*Id.* at 11-12.)

Likewise, in its February 11, 2013 Order requiring Plaintiffs' withdrawal of 150 non-party subpoenas, this Court concluded that it was "reasonable to infer the plaintiffs may be seeking to use discovery in this case to collect evidence for use in parallel proceedings before the

**manatt**


manatt | phelps | phillips

Honorable Patty Shwartz

March 19, 2013

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FCC which in itself would violate the FCC's rules concerning third party discovery" and that permitting the non-party subpoenas "poses a significant risk that any documents obtained could be used improperly before another tribunal." (ECF No. 150 at 11.)



The Court's concern about Plaintiffs' improper use of discovery in this case is well-founded. Last month, Plaintiff Warren Havens (on behalf of the Plaintiff entities) publicly stated his intention to seek from the Administrative Law Judge in the concurrent FCC action subpoenas that would require parties in this action to produce documents obtained in this litigation for use in the administrative proceedings. (See Exh. B, FCC Notice at p. 3-4, 9.) Notably, Mr. Havens brazenly asserted that "there is no legal or equitable bar" to seeking such documents. (*Id.* at p. 3.) Following a meet-and-confer on this issue, and after co-Defendant MCLM's counsel drafted a portion of a joint letter brief, Plaintiffs' counsel indicated by email that Mr. Havens has "no present intention" of pursuing such a subpoena request, thereby impliedly reserving the right to do so at a later date. (Exh. C, T. Richards Email, Feb. 21, 2013.) Plaintiffs' litigation counsel are not representing Plaintiffs in the FCC proceedings.

Because Plaintiffs' only remaining claim for relief is based on alleged violation of Section 1 of the Sherman Act, Plaintiffs should not be permitted to engage in a time-consuming, fishing expedition designed to elicit information about the validity of Paging Systems' AMTS licenses, issues that are properly resolved by the FCC and should be subject to the FCC's procedures for securing information from its licensees. Mrs. Cooper, who is not mentioned in the Complaint's conclusory allegations purporting to establish any concerted activity among the Defendants, should not be subjected to hours of unreasonable questions about FCC licensing matters wholly irrelevant to Plaintiffs' allegations of antitrust conspiracy.

### **PLAINTIFFS' POSITION**

In its Order filed March 4, 2013 (ECF No. 157), this Court ordered the March 20, 2013 deposition of Susan Cooper, President and sole owner of defendant Paging Systems, Inc., the exclusive holder of all of PSI's FCC licenses, after defendants had failed to make her available and for months dragged their feet providing a date for her deposition. Now, two weeks after entry of the Court's Order and one day before Mrs. Cooper's deposition date, defendants have taken the calculated action of bringing to the Court's attention *for the first time* Mrs. Cooper's purported inability to sit for a deposition *at any time*, for purported medical reasons of which they clearly have been aware since before the filing of this action. See PSI Exh. A (Mrs. Cooper's (presumed) physician's unauthenticated, scribbled jotting, *dated June 20, 2008*, allegedly drafted in connection with her efforts to be exempted from jury duty in 2008). By their purposeful and calculated actions in direct violation of the text and spirit of this Court's March 4<sup>th</sup> Order (ECF No. 157), defendants seek to impede plaintiffs' discovery rights under the federal and local rules and the March 4<sup>th</sup> Order of this Court, prejudice plaintiffs' deposition efforts on

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both coasts this week with this untimely interruption, and ultimately undermine plaintiffs' ability to effectively and substantively respond to defendants' planned dispositive motions on the calendar previously set by this Court. Defendants' bad faith actions should not be rewarded, and plaintiffs respectfully request that this Court order the in-person videotaped deposition of Mrs. Cooper in April under conditions appropriate to her *current* medical status, that the deadlines for filing dispositive motions and other pleadings, including pretrial submissions, be extended accordingly, and for monetary and other sanctions against defendants, as appropriate,<sup>2</sup> for their bad faith actions in connection with this matter.

Plaintiffs are not unsympathetic to a physical condition from which Mrs. Susan Cooper, President and sole owner of Paging Systems, Inc., claims, via defendants' counsel, to suffer, but they are incredulous:

- incredulous that defendants' counsel waited until a day prior to Mrs. Cooper's court-ordered deposition to bring to the Court's attention a condition her alleged physician described in a scribbled jotting or note *dated June 20, 2008* that was meant to exempt her from sitting upright for hours on jury duty (PSI Exh. A), rather than making the Court aware of her purported condition before or immediately after this Court ordered Mrs. Cooper's deposition in its March 4<sup>th</sup> Order responding to the parties' previous joint letter of March 1<sup>st</sup>;
- incredulous that Mrs. Cooper cannot be deposed while lying down, or standing up or sitting for brief periods over a period of days, when her physician *in June 2008* described her post-surgical condition as unable "to sit more than short periods" (PSI Exh. A);
- incredulous that Mrs. Cooper has not obtained medical care or advice since June 2008 when her condition was described as due, at least in part, to a surgical procedure ("laminectomy") that already had occurred when the physician scribbled the note (PSI Exh. A) and which surgical procedure is generally meant to *alleviate*, not cause, pain, *see e.g.*, <http://www.everydayhealth.com/health-center/laminectomy-and-laminotomy-definition.aspx>;
- incredulous that Mrs. Cooper is, and since 2008 has been, able to lead and run a multi-million dollar company<sup>3</sup> that, as she alleges before the FCC and the market, has national operations at dozens of commercial mobile radio stations constructed and in permanent operation serving the public and that, for over a decade,

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<sup>2</sup> Plaintiffs respectfully reserve the right to address the Court as to specific, appropriate sanctions. However, the immediate need is to secure, once and for all, the deposition of Mrs. Susan Cooper, the alleged sole owner and President of defendant PSI. PSI is an indispensable party to this litigation, as noted in plaintiffs' operative Second Amended Complaint.

<sup>3</sup> E.g., see discussion of AMTS spectrum valuation described in the expert report of Charles Walters in this case.



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restrained and blocked plaintiffs' competing business efforts, and yet is unable to be present for seven hours of deposition *under any conditions or circumstances* meant to accommodate her specific condition (such as being deposed from a sofa or hospital bed or during brief periods over a period of days).

Defendants do not argue that Mrs. Cooper is *non compus mentus* or otherwise mentally impaired as a result of medication. They do not argue that she is hospitalized. And they do not argue that she is immobilized. Conspicuously, they do not present evidence of her current medical status and do not request an evidentiary hearing to establish her inability to appear for a deposition. At most, defendants argue that deposing Mrs. Cooper would be inconvenient because, in June 2008, she could not, or they believe she could not, sit upright for hours at a time. This is not a proper basis upon which to oppose, much less impede, a deposition of the President and sole owner of an indispensable corporate defendant, who purportedly has made all of the executive decisions on behalf of her corporation during the period that is the subject of this action, including since June 2008, and whose direct testimony and critical information, by her own allegation of sole ownership and control in PSI, are not obtainable from another source. And defendants' purposeful delay in asserting information regarding Mrs. Cooper's purported physical status, which was in their possession and control since June 2008, is unconscionable. Defendants' assertion of such information only on the eve of Mrs. Cooper's Court-ordered deposition date and soon before the Court's deadlines for filing of dispositive motions is highly prejudicial to plaintiffs and, in addition to flaunting the fabric and spirit of the Court's March 4<sup>th</sup> Order, is meant to preclude plaintiffs from making use of critical information exclusively within Mrs. Cooper's knowledge and control, and with the expectation that plaintiffs will have no recourse.

The Court should not reward defendants' bad faith and purposeful efforts to withhold critical information regarding Mrs. Cooper's purported medical status, and should not credit the veracity of dated medical information based on an informal jotting or scribbled note dated June 20, 2008 meant to exempt Mrs. Cooper from jury duty because, nearly five years ago, she was unable to sit upright for hours at a time following an asserted laminectomy. Nor should the Court honor defendants' extreme request to bar Mrs. Cooper's deposition or limit plaintiffs' right under Federal Rule 26 to take the in-person deposition of this key corporate officer. Instead, plaintiffs respectfully request that this Court order Mrs. Cooper to make herself available during the month of April 2013 for a videotaped deposition, consistent with the federal and local rules, under circumstances meant to ensure her comfort; for example, that Mrs. Cooper's deposition occur while she is seated, lying down or standing – options that are obviously available to Mrs. Cooper, that are not inconsistent with her medical status and that defendants conspicuously omitted from among the extreme remedies they suggest in their desperate attempt to prevent Mrs. Cooper's deposition. Plaintiffs further request that the Court extend all dates for the filing of pleadings and trial preparation accordingly, so that plaintiffs are not prejudiced by defendants' bad faith efforts to preclude the deposition of the President and

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sole owner of an indispensable corporate defendant in this action. Thus, plaintiffs seek leave of Court to file motions (i) to compel the testimony of Susan Cooper by way of deposition consistent with Federal Rule 26, (ii) to extend the dates set by the Court for the filing of pleading and trial preparation in this matter so as to avoid substantial prejudice to plaintiffs, and (iii) for plaintiffs' costs and sanctions, as appropriate, for defendants' bad faith actions in connection with this matter.

Defendants have offered NO support for their apocryphal claims that Mrs. Cooper is currently unable to sit upright for hours, is currently unable to be deposed in an alternative physical position (e.g., lying down or on her side) or that she currently suffers from such substantial pain or takes medication so as to make her unfit to provide testimony in this matter (but nonetheless continues to be the sole owner, acting as President and operating executive of PSI's alleged nationwide operations). Defendants have proffered an unauthenticated jotting of a physician, dated June 20, 2008, without any indication that the physician has applicable (orthopedic/neurological) expertise and is/was the personal physician of Mrs. Cooper, even at that now-stale date. Further, notwithstanding that defendants have delayed for weeks, if not months, providing this medical information they allege is valid, they have failed to provide any sworn affidavit of a medical expert, much less that of a physician with appropriate expertise who has recently examined Mrs. Cooper and is qualified to comment on her current medical status and ability to be deposed in this action under appropriate conditions. Instead, defendants have dropped a legal "red flag" that is not entitled to judicial notice or credit, and certainly is not a basis to preclude and undermine plaintiffs' rights to prosecute this action.

If Mrs. Cooper, rather than her spouse and his assistants, currently owns and controls PSI as its sole executive officer, and its alleged nationwide business, as defendant PSI has alleged and consistently argued to the market and the FCC, *see* PSI's and Susan Cooper's FCC Ownership Disclosure Form 602 (attached hereto as Plaintiffs' Exh. 2), she should be able to provide testimony via in-person deposition in this matter. Defendants' argument that the deposition testimony of Mr. Cooper and Mr. Kling, representatives of TouchTel, should suffice for any testimony Mrs. Cooper may provide, undermines PSI's consistent arguments to the FCC that PSI is a separate and unique entity from TouchTel and entitled to the benefits of such a separate and unique entity. Defendants' spurious argument that "[t]he Court has discretion to preclude the deposition of a high corporate official where the corporate official has no personal or unique knowledge of the facts and plaintiff has access to other agents better suited to provide information regarding the facts subject to discovery," citing *Ford Motor Co. v. Edgewood Properties, Inc.*, 2011 WL 2517133 at \*3 (D.N.J. June 23, 2011) (citing *Reif v. CAN*, 248 F.R.D. 448 (E.D. Pa. 2008)), belies and undermines years of consistent representations by PSI and TouchTel before the FCC that PSI and TouchTel are separate and distinct entities, and that PSI is solely owned and controlled by Mrs., and not, Mr. Cooper. *See, e.g.*, Plaintiffs' Exh. 2.



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In support of their argument that Mrs. Cooper should be prevented from providing testimony in this action, defendants make the fatuous argument that “Plaintiffs should not be permitted to engage in a time-consuming, fishing expedition designed to elicit information about the validity of Paging Systems’ AMTS licenses, issues that are properly resolved by the FCC and should be subject to the FCC’s procedures for securing information from its licensees.” However, defendants well know that plaintiffs’ Sherman Act claims in this action involve, among other things, defendants’ purposeful and concerted efforts between and among themselves to unlawfully obtain, maintain and use FCC AMTS licenses in a manner that violated the Sherman Act and damaged plaintiffs,<sup>4</sup> including FCC AMTS licenses that, according to the recent testimony of PSI’s own expert, defendants knew or should have known had automatically terminated and which automatic terminations defendants improperly delayed disclosing to the FCC, even while seeking renewal of such (terminated) licenses. See, e.g., Deposition Tr. of Michael Fitch, expert for PSI, at p. 98 l.12- p. 99 l.7; p. 99 l.10- p. 100 l.20; p. 109 ll.12-22 (obligation to report regulatory automatic termination of a license within two years of such termination) (attached hereto as Plaintiffs’ Exh. 1). As President and sole owner of defendant PSI, Mrs. Cooper is or should be uniquely aware of the actions and omissions of PSI, and if, as defendants suggest here, she is uniquely unaware of the actions and omissions of the company she owns and leads, that, too, is information critical to the proof of the surviving allegations in this antitrust action.

If, as defendants argue, Mrs. Cooper is able to answer questions by written interrogatory or to sit for an in-person deposition for shorter periods of time, she should be able, with reasonable accommodation, to appear and provide direct testimony consistent with plaintiffs’ rights in this action and under the federal and local rules and the March 4, 2013 Order of this Court. In fact, the surgical laminectomy procedure that Mrs. Cooper underwent prior to June 2008, is generally meant to and usually does provide relief from pain through removal of lamina thereby relieving pressure on the spinal cord and nerve roots, see, e.g.,

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<sup>4</sup> Defendants’ suggestion herein that deposing Mrs. Cooper should be curtailed in advance due to concerns that her testimony will be used for purposes outside of this litigation, including FCC proceeding purposes, is at best a red herring. Further, defendants did not seek reconsideration of the Court’s decision not to dismiss and to allow plaintiffs’ Sherman Act Section 1 claims to proceed fully as stated in the Second Amended Complaint, and that statement properly asserts under the Sherman Act that defendants unlawfully obtained and used FCC licenses in violation of the Sherman Act. There has been no misuse of this Court’s processes, or FCC processes, in either forum. Plaintiffs do not accept that defendants’ manipulation of the discovery process in this action can be used as a proxy for reconsideration or other attempts to cut back any part of plaintiffs’ Sherman Act claims, which this Court already determined as proper for discovery and final adjudication.

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<http://www.everydayhealth.com/health-center/laminectomy-and-laminotomy-definition.aspx>, and defendants have provided no medical support or evidence otherwise, apart from an unauthenticated handwritten jotting from a physician that was scribbled nearly five years ago for purposes wholly unrelated and irrelevant to this proceeding.

As defendants have made no credible showing of Mrs. Cooper's present inability or other unavailability to appear for her in-person deposition or that she currently suffers from "failing health" (Fed. R. Civ. P. 26(c)(1)), their duplicity should not be rewarded by the Court to the prejudice of plaintiffs' rights to prosecute this action, and plaintiffs respectfully request that this Court grant their requests for relief, including that Mrs. Cooper appear during the month of April 2013, for a full, in-person, videotaped deposition.

\* \* \*

I am happy to arrange a conference call with all counsel should the Court want to discuss this joint letter.

Respectfully submitted,

/s/ Kenneth D. Friedman  
Kenneth D. Friedman

KDF:sbs  
cc: All Counsel of Record (via ECF)

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307251544.1

# **DEFENDANT'S EXHIBIT A**

DEA # AA1409590

Lic # G5042

PHILIP R. ALPER, M.D.  
1838 EL CAMINO REAL, SUITE 102  
BURLINGAME, CA 94010

(650) 697-0361

Name Susan Cooper Age \_\_\_\_\_

Address \_\_\_\_\_

SECURITY FEATURES ON BACK Date 6/20/08

R Please exempt from jury  
duty. Cannot sit more  
than short periods due  
to low-back syndrome  
post-laminectomy.  
Stability permanent.

NFX05012027366

☐ Label

Refill \_\_\_\_\_ times PRN NR

Do Not Substitute ☐

Alper  
M.D.

To ensure brand name dispensing check and initial box.



## **DEFENDANT'S EXHIBIT B**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re	)	
	)	
MARITIME COMMUNICATIONS/LAND MOBILE, LLC	)	EB Docket No. 11-71
	)	File No. EB-09-01-1751
Participation in Auction No. 61 and Licensee	)	FRN: 001358779
Of Various Authorizations in the Wireless	)	
Radio Services	)	
	)	
Applicant for Modification of Various	)	App. FNs 0004030479,
Authorizations in the Wireless Radio Services	)	0004144435, 0004193028,
Applicant with ENCANA OIL AND GAS	)	0004193328, 0004354053,
(USA), INC.; DUQUESNE LIGHT	)	0004309872, 0004310060,
COPANY; DCP MIDSTREAM, LP;	)	0004314903, 0004315013,
JACKSON COUNTY RURAL,	)	0004430505, 0004417199,
MEMBERSHIP ELECTRIC	)	0004419431, 0004422320,
COOPERATIVE; PUGET SOUND	)	0004422329, 0004507921,
ENERGY, INC.; INTERSTATE	)	0004153701, 0004526264,
POWER AND LIGHT COMPANY;	)	0004636537, 0004604962.
WISCONSIN POWER AND LIGHT	)	
COMPANY; DIXIE ELECTRIC	)	
MEMBERSHIP CORPORATION, INC.;	)	
ATLAS PIPELINE – MID CONTINENT,	)	
LLC; DENTON COUNTRY ELECTRIC	)	
COOPERATIVE, INC., DBA COSERV	)	
ELECTRIC; AND SOUTHERN	)	
CALIFORNIA REGIONAL RAIL	)	
AUTHORITY	)	

To: Marlene H. Dorch, Secretary  
Attention: Chief Administrative Law Judge Richard L. Sippel

Notice of Discharge of Previous Counsel  
And Related Matters

Initially, related to and drawing upon materials provided in this Notice to explain the context of this Notice, the undersigned for SkyTel entities will separately submit a Request for Subpoenas, with draft Subpoenas.<sup>1</sup>

- I -

The undersigned, Warren Havens, provides this Notice that I have discharged attorney

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<sup>1</sup> See Appendix 2 below.



Jim Chen and The Havener Law Firm from representing myself and the Skytel entities in this Maritime Hearing.

The reason for the discharge is noted in my recent two filings in this Hearing.<sup>2</sup> It is not regarding differences between the undersigned and Mr. Chen regarding matters of this Hearing (which did not arise),<sup>3</sup> but regarding the expert role of Mr. Chen in the US District Court case I described<sup>4 5</sup> and Maritime objections raised in that case as to his expert role therein in relation to his services in this Hearing.<sup>6</sup>

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<sup>2</sup> Motion to Dismiss and in the Alternative Opposition To Motion for Summary Decision, dated and filed February 7, 2013, and Motion to Dismiss and in the Alternative Opposition To Petition for Stay, dated and filed February 1, 2013.

<sup>3</sup> Mr. Chen's substantive participation in this Hearing was in the form of one memo on authorities showing the meaning, applied to AMTS site-based licenses, of "construction" and interdependent terms including "operation." This memo was requested by the Judge, addresses core "issue (g)" law, and should be compared with the Maritime position. Mr. Chen's memo participation in this Hearing is fully consistent with SkyTel's past filings in this Hearing, before the Commission, and before the Wireless Bureau for years, including their *pro se* petitions cited by the Commission in the HDO FCC 11-64 that lead to this Hearing.

<sup>4</sup> *Havens [and Skytel entities] v. Mobex, Maritime, et al.*, Civ. Action No. 11-993, US District Court, NJ ("Maritime Antitrust Case"). This court action preceded the instant FCC Hearing. SkyTel entities allege violations of US antitrust law by defendants Maritime et al. including by their concerted violations of FCC law, including those involving "issue (g)" in this Hearing. See Appendix 1 below citing *US v RCA*, 358 U.S. 334: violation of antitrust law is considered by the FCC in licensing decisions, and violation of FCC law may be, as in this court case, a component of violation of antitrust law, finding of which can allow the judge to directly revoke the FCC licenses involved under 47 USC §313.

<sup>5</sup> Mr. Chen also testified as an expert (which the court accepted) for SkyTel entities in the Maritime bankruptcy case Chapter 11 Plan confirmation hearing, including why the Plan lacks feasibility in that it relies on Maritime obtaining so-called "Second Thursday" relief from the FCC without being able to satisfy the FCC intent or criteria for said relief. The FCC, represented by US DOJ also submitted testimony on this issue at this hearing. Maritime presented as its expert on this issue, Robert Keller who represents Maritime in this FCC Hearing.

<sup>6</sup> Maritime has a history of both attempts to block SkyTel entities from participating in this Hearing, with counsel and *pro se*, largely to suppress evidence. SkyTel commenced on a *pro se* basis, just as it left off in the underlying licensing proceedings cited in the HDO FCC 11-64. Upon obtaining counsel, Maritime (and most all of the Applications, captioned above) requested the Judge to deny or limit SkyTel party rights, which was denied. Maritime and some Applicants later sought to limit *pro se* rights of the undersigned. (Continued)

I am seeking new counsel for advice and representation, as appropriate. Until I obtain new representation, I will continue *pro se* as I commenced in my recent two filings.<sup>7</sup>

I may also submit, in this public Hearing and docket, factual information for the Judge's consideration as I have in the past.

- II -

By the other text herein including in footnotes and the Appendixes, I provide important further information relevant to this Notice and critical to issue (g) in this Hearing.

I attempt to place the Maritime objection as to Mr. Chen noted above in context of Maritime's history of suppressing evidence needed by the FCC including evidence essential for a sound record to decide upon issue (g).

I also attempt to show why the evidence at issue, being suppressed, should be brought into this Hearing and that there is no legal or equitable bar, and to not do so will lead to judicial inefficiencies. This evidence is directly essential to issue (g).<sup>8</sup> This evidence is also important

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(Continued) *As to relevant facts*, Maritime has acted in the Maritime Antitrust Case to keep evidence of decisional importance to issue (g) away from the Judge and Enforcement Bureau in this Hearing as partly indicated in the last of my two filings described in footnote 2: said evidence in this court case include, in addition to the "NCASS" 101 boxes of documents, scores of document subpoena responses from the owners and controllers of Maritime issue-(g) "stations" (Maritime does not use the definition in Part 80 and Part 1 rules for this term, which means actual stations) across the nation, as to their construction and operation, and lack thereof: *materials Maritime did not provide to the Enforcement Bureau in this Hearing under its document-production requirements*. While suppressing this critical evidence, Maritime acts with and by Choctaw to seek a summary decision on their restricted set of facts.

Again, see the Appendix 1 below, citing the US Supreme Court as to consideration of the same facts of FCC licensee violations of FCC law *in both* (i) a FCC licensing hearing before the FCC and under its jurisdiction, and (ii) an antitrust law action before a US court, under its jurisdiction including under the Antitrust Savings Clause in the 1996 Telecom Reform Act.

<sup>7</sup> In these two filings (see footnote 2 above), I also explained the distinctions between my personal interests and those of the Skytel entities which I may further supplement, in accord with the Judge's past instructions.

<sup>8</sup> While issue (g) deals facially only with license terminations for what may be deemed to be only failures to construct and/ or keep in permanent operation, if the evidence shows false

and I believe essential regarding any FCC consideration of the Maritime-Choctaw “Second Thursday” relief initiatives in that it goes to the weight of FCC regulatory interests, including willful and repeated violations of FCC law, withholding evidence, lack of candor, and licensee character and fitness.

As indicated initially above and discussed in Appendix 2 below, I will separately file, as soon as I can (within a business day or two, as planned) a certain Request for Subpoenas aimed at getting this evidence before the Judge and the Enforcement Bureau.

Respectfully submitted,

/s/

Warren Havens  
Individually and for SkyTel legal entities  
(previously defined in this case)

2509 Stuart Street  
Berkeley CA 94705  
510 841 2220, 848 7797

Dated: February 14, 2013

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licensing applications and filings to obtain and maintain licenses, that is not failure to act, but unlawful action contrary to the threshold FCC requirement for licensing, which can lead to sanctions including license revocation, fines, and referral to the Department of Justice. See also Appendix 2 above regarding licensing statements and 18 USC §1001.

## Appendix 1

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The following three court decisions are related, and the findings in this are relevant to SkyTel attempts to get critical evidence on issue (g) into this FCC Hearing, and Maritime attempts to block that.

As shown below in the cited case text below:

*There is not only no jurisdiction bar, but there is good cause for the “Commission [to have] all the information available to the Court before it,”*

*That may be the only judicially efficient course where—as here—both the Court and the FCC must ultimately deal with the same facts as to violation of FCC law by a licensee, and where, based upon these facts, the Court considers violation of FCC law in its determination of violation of antitrust law, and the FCC considers violation of antitrust law in determining licensing actions.*

An arrangement where the “Commission [has] all the information available to the Court before it,” is efficient, and other arrangements are not, including since “[e]ven though F.C.C. approval has been granted, transactions are not immunized from challenge under the antitrust laws.”

From *US v RCA*, 358 U.S. 334 (emphasis added):

18. This conclusion is re-enforced by the Commission's disavowal of either the power or the desire to foreclose ... antitrust actions aimed at transactions which the Commission has licensed. This position was taken both before the district judge below, and in a Supplemental Memorandum filed in this Court, page 8:

"Concurrent with the jurisdiction of the Department of Justice to enforce the Sherman Act, the Commission, of course, has jurisdiction to designate license applications for hearing on public interest questions arising out of facts which might also constitute violations of the antitrust laws. This does not mean, however, that its action on these public interest questions of communications policy is a determination of the antitrust issues as such. Thus, while the Commission may deny applications as not in the public interest where violations of the Sherman Act have been determined to exist, its approval of transactions which might involve Sherman Act violations is not a determination that the Sherman Act has not been violated, and therefore cannot forestall...an antitrust suit challenging those transactions."

....  
This is not to imply that federal antitrust policy may not be considered in determining whether the "public interest, convenience, and necessity" will be served ..., for this Court has held the contrary.

From *McKeon Construction v. McClatchy Newspapers*. 1969 U.S. Dist. LEXIS 10593; 1969 Trade Cas. (CCH) P73, 212, citing *US v RCA* (above) (emphasis added; asterisks in original):

The question of whether F.C.C. approval bars action under the antitrust laws was considered in a different factual situation in *United States v. Radio Corporation of America, et al.*, 1959, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354. .... The F.C.C. approved the exchange. The United States brought a civil suit, grounded on a Section 1, Sherman Act violation.

The defendant advanced the argument that the F.C.C. approval foreclosed subsequent Government action. It was stipulated that the Commission had all the information available to the Court before it and "that the F.C.C. decided all issues relative to the antitrust laws that were before it". For R.C.A. to prevail, the Court held, it would be necessary to demonstrate the extent to which Congress authorized the Commission to pass on antitrust questions.

The Court, after examining the history of the Radio Act of 1927 held that "[while] this history compels the conclusion that the F.C.C. was not intended to have any authority to pass on antitrust violations as such, it is equally clear that courts retained jurisdiction to pass on alleged antitrust violations irrespective of Commission action." (358 U.S. at 343, 344.) Subsequent amendments, retracting language in the Radio Act concerning antitrust violations did not dispose of the overriding policy, as it "apparently [was] considered that inherent in the scheme of the Act was the right to challenge under the antitrust laws even transactions approved by the Commission \* \* \*". (358 U.S. at 345).

Finally the Court held, "Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts." (358 U.S. at 346). 27

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27 In holding that the Commission did not have primary jurisdiction over the antitrust laws, the Court stated:

"This is not to imply that federal antitrust policy may not be considered in determining whether the 'public interest, convenience, and necessity' will be served by proposed action of a broadcaster, for this Court has held the contrary. Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met.... (358 U.S. at 351, 352).

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Defendant would restrict *United States v. Radio Corporation of America*, to its facts, and have the court hold that F.C.C. approval can only be overturned by the antitrust laws when the antitrust violations occurred prior to the Commission's license grant. While factually distinguishable, I see no reason to so restrict *United States v. R.C.A.* Even though F.C.C. approval has been granted, transactions are not immunized from challenge under the antitrust laws. It would be inconsistent to grant immunity to those who gain Commission approval and receive licenses before engaging in actions in restraint of trade ... and subject those who act before F.C.C. approval to the full force of the antitrust laws. This conclusion

receives support from 47 U.S.C. § 313 [in the Communications Act], which states in pertinent part:

"(a) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to \* \* \* interstate or foreign radio communications. \* \* \*

From the Opinion, 2011 U.S. Dist. LEXIS 148654, on the Maritime motion to dismiss in Havens [and Skytel entities] v. Mobex, Maritime, et al., Civ. Action No. 11-993, US District Court, NJ ("MCLM Antitrust Case") (emphasis added):

Defendants argue that the FCA established an elaborate framework under which the FCC regulates radio frequency allocation, and that the FCA therefore preempts Sherman Act claims because those claims may interfere with FCC radio frequency determinations. Absent from defendants' argument, however, is any authority to suggest that a court should abstain from hearing a case within its jurisdiction merely because it touches on an area subject to sophisticated agency regulation. Cf. *Raritan Baykeeper v. Edison Wetlands Ass'n, Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (in context of primary jurisdiction doctrine, noting that "[w]hen 'the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility'" (quoting *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1094 (3d Cir. 1995) (further citations omitted))).

More to the point, defendants' argument ignores 47 U.S.C. § 152, in which an uncodified amendment states that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Pub. L. No. 104-104, § 601(b)(1) (1996). The amendment further clarifies that the term "antitrust laws" includes the Sherman Act. Pub. L. No. 104-104, § 601(e)(4). The legislative history of this amendment clarifies that when Congress enacted the Telecommunications Act of 1996, it sought to ensure that the FCC could not "confer antitrust immunity" through the course of its decision making. See S. Rep. No. 104-230, at 178-79 (1996) (Conf. Rep.). Thus, Congress envisioned a system in which the FCC could consider antitrust matters when reaching decisions, but that the FCC's decisions would not preclude the operation of independent antitrust statutes. See *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) (holding that notwithstanding arguments for implied immunity, "the savings clause preserves those claims that satisfy established antitrust standards" (citation and quotation marks omitted)). Accordingly, the FCA does not preempt plaintiffs' Sherman Act claim.

\* \* \* \*

### 3. Sherman Act Section 1 Claim

A claim under section one of the Sherman Act, 15 U.S.C. § 1, consists of four elements: "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action[ was] illegal; and (4) . . . [plaintiff] was injured as a proximate result of the concerted action." Howard Hess Dental Labs., Inc., 602 F.3d at 253 (quoting *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 (3d Cir. 2005)). Defendant alleges that the complaint fails to satisfy the first element because it does not allege that defendants

"conspired or agreed to act in concert with any other party, let alone the other defendants." (Defs.' Br. Supp. Mot. Dismiss 39.) See also *Twombly*, 127 S. Ct. at 1961 (in antitrust case, insufficient to allege "parallel conduct unfavorable to competition" without "some factual context suggesting agreement, as distinct from identical, independent action").

The facts here, however, are distinguishable from the facts in *Twombly*. Here, plaintiff has stated sufficient facts to "allow[] the court to draw the reasonable inference that" defendants had the requisite intent to act in concert. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 127 S. Ct. at 1965). First, plaintiff alleges specific reasons for the defendants' decisions to act in concert, such as that the defendants made a spectrum-splitting arrangement to allow each to share in the benefits of the AMTS licenses. (See Second Am. Compl. ¶ 36.) Moreover, Havens learned through communications with PSI that PSI and Mobex were cooperating and had an intertwined financial stake in the AMTS spectrums at issue. (*Id.* ¶ 38.) Cooperation could also be seen in other areas, such as Mobex and PSI locating stations at the same sites in order to reduce costs. (*Id.* ¶ 39.) This cooperation extended beyond physical interactions, as Mobex and PSI jointly petitioned the FCC on certain matters regarding the licenses. (*Id.* ¶ 41.)

The complaint alleges a history of cooperation and interactions between the companies on the very licenses at issue in this case. This makes plausible plaintiffs' allegation of concerted action, and plaintiffs have therefore stated a claim on which relief can be granted.

///



## Appendix 2

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The Subpoena Requests will be presented soon after this Notice is submitted (the planned date is Friday February 15, 2013, tomorrow, or the next business day).

The Requests will ask the Judge to issue a subpoena, under authority to do so that will be cited, to require from Maritime and SkyTel documents in their possession (large quantities recently obtained, and additional ones being regularly obtained) in the Maritime Antitrust Case discussed below are essential to “issue (g)” in this FCC Hearing, as well as to the other issues including license revocation and fines, and the required “weighing” under any “Second Thursday” consideration.

Some of the documents are indicated herein above.

The Judge has stated his interest in these documents in past prehearings and resultant Orders, and the Enforcement Bureau document requests in this Hearing to Maritime, SkyTel and others also cover the scope of these documents.

The Request for Subpoenas will cite these statements and requests, present why the Subpoenas are required, and why the subject documents (but for possibly small portions that may be redacted that are not relevant to Maritime violation of FCC and antitrust law) cannot be, as Maritime asserts, suppressed from use in this FCC Hearing or any other lawful purpose, including referral to the Department of Justice if violations of the threshold FCC licensing requirement is found. Form 601 (and other licensing forms) summarize this threshold requirement:

WILLFUL FALSE STATEMENTS MADE ON THIS FORM OR ANY ATTACHMENTS ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. Code, Title 18, §1001) AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, §312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, §503).

The evidence in demonstrates repeated willful false statements over decades on FCC licensing forms and other filings.

CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 14, 2013, I caused a true copy of the foregoing filing in FCC docket 11-71 to be served by USPS first class mail (with courtesy email copies, using emails of record) to:

Hon. Richard L. Sippel  
Chief ALJ, FCC  
445 12th Street, S.W.  
Washington, DC 20554

Pamela A. Kane, Brian Carrter  
Enforcement Bureau, FCC,  
445 12th Street, S.W., Room 4-C330  
Washington, DC 20554

Robert J. Keller  
Law Offices, Robert J. Keller  
P.O. Box 33428  
Washington, DC 20033

Robert J. Miller  
Gardere Wynne Sewell  
1601 Elm Street, Suite 3000  
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R. Gurss, P. Feldman H. Cole, C. Goepp,  
Fletcher, Heald & Hildreth  
1300 N Street, 11<sup>th</sup> Floor  
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Wiley Rein  
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J. Richards, W. Wright  
Keller and Heckman  
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Washington, DC 20001

A. Catalano, M. Plache  
Catalano & Plache  
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Washington, DC 20007

C. Zdebski, E. Schwalb  
Eckert Seamans Cherin & Mellott  
1717 Pennsylvania Avenue, N.W.  
Washington, DC 20006

Jeffrey L. Sheldon,  
Levine Blaszak Block Boothby  
2001 L Street, Ste 900  
Washington DC 20036

R. Kirk, J. Lindsay, M. O'Connor  
WILKINSON BARKER  
2300 N Street, NW Ste 700  
Washington, DC 20037

/s/

---

Warren Havens

# **DEFENDANT'S EXHIBIT C**

**Lacks, Jeremy**

---

**From:** Richards, R.N. Tendai [TRICHARDS@winnebanta.com]

**Sent:** Thursday, February 21, 2013 2:41 PM

**To:** Robert Mauriello; Friedman, Kenneth; Hahm, Eugene

**Cc:** Steve Zelinger

**Subject:** Skybridge v. Mobex, et al.

All,

As I informed Rob over the phone a few minutes ago, after a long series of communications, I can report that Mr. Havens has no present intention of filing anything with the FCC (or more precisely the ALJ assigned to the subject enforcement action), which obviates the need to do a joint letter addressing that issue. As I indicated to Rob, I will contact Mr. havens today to ensure that he withdraws the certifications/applications or whatever they are properly termed in which he indicated that he was intending to submit something seeking to invoke the FCC's subpoena power.

On another issue, neither Steve Zelinger or I have received any information regarding deposition dates for any of the individuals that we discussed: specifically, dates you wish to take depositions of plaintiffs experts, the dates PSI's expert is available, or when the Coopers, the DePriests, Predmore, Leong, Jones, etc. will take place.

For ease of reference, plaintiffs' experts are available as follows:

1. Ron Lindsay is available March 4-8 (he is in Florida)
2. Jeffrey Reed is available March 7 and 8 (Virginia)
3. Raja Sengupta is available February 25-March 1 and then March 4-8 (California)
4. Charles Walters is available March 4-8 (North Carolina)
5. Dave Shpigler is available February 25, 26 and March 4-8 (New York)
6. Jim Chen has been scheduled to be deposed at my office on March 6
7. Warren Havens is available to be deposed in New Jersey on March 1 (since he will be the 30(b)(6) witness, he may also be available on February 28)
8. Jimmy Stobaugh is not either an owner or officer of any of the plaintiff entities, as such, he can only be deposed as a fact witness and not compelled to come to New Jersey. He will be made available to be deposed in California.

Currently, John Reardon is scheduled to be deposed on March 26 at Rob's office, however, that may need to be adjusted depending on how all the other deposition dates line up. Unless we can get dates firmed up by tomorrow, I will have to reschedule Mr. Reardon and possibly Mr. Havens as he will need to make travel arrangements.

Tendai



**Tendai Richards, Esq.**

**Winne, Banta, Hetherington, Basralian & Kahn, P.C. | visit us at [WinneBanta.com](http://WinneBanta.com)**

Court Plaza South - East Wing - Suite 101

21 Main Street, Hackensack, New Jersey 07601

Direct 201.562.1099 | Firm 201.487.3800 | Fax 201.487.8529 | [trichards@winnebanta.com](mailto:trichards@winnebanta.com)

Legal Assistant: Lourdes Diaz

Tel. 201.487-3800 ext.1027 | [ldiaz@winnebanta.com](mailto:ldiaz@winnebanta.com)

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# **PLAINTIFF'S EXHIBIT 1**



**PLAINTIFFS' EXH. 1**  
**(EXCERPTS FROM DEPOSITION TRANSCRIPT OF PSI EXPERT MICHAEL FITCH)**

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEW JERSEY

4 \_\_\_\_\_ )  
5 HAVENS, et al., )  
6 Plaintiffs, )  
7 vs. ) No.  
8 MOBEX NETWORK SERVICES, )  
9 LLC, et al., )  
10 Defendants. )  
11 )  
12 )

15 CONFIDENTIAL PURSUANT TO THE PROTECTIVE ORDER  
16 DEPOSITION OF MICHAEL T.N. FITCH  
17 San Francisco, California  
18 Friday, March 8, 2013  
19 Volume I

21 Reported by:  
ELAINE A. DELLINGES, RPR

22 CSR No. 5049  
23 Job No. 1625989

25 PAGES 1 - 167

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEW JERSEY

3

4

5 HAVENS, et al., )  
6 Plaintiffs, )  
7 vs. ) No. ) 2:11-cv-00993-KSH-PS

8 MOBEX NETWORK SERVICES, )  
9 LLC, et al., )  
10 Defendants. )

11

12

13

14

15 )

16

17

18

19 Confidential Deposition of MICHAEL T.N. FITCH,  
20 Volume I, taken on behalf of Plaintiffs, at One  
21 Embarcadero Center, 31st Floor, San Francisco,  
22 California, beginning at 10:13 a.m. and ending at  
23 5:02 p.m., on Friday, March 8, 2013, before ELAINE A.  
24 DELLINGES, Certified Shorthand Reporter No. 5049.

25

1 APPEARANCES:

2

3 For Plaintiffs:

4 AXIOM LAW

5 BY: STEVE ZELINGER

6 Attorney at Law

7 1170 University Avenue  
8 Palo Alto, California 94301  
9 650.438.3434  
10 stevezelinger@aol.com  
11  
12 For Defendants Paging Systems, Inc. and Touch Tel  
13 Corporation:  
14 MANATT, PHELPS & PHILLIPS, LLP  
15 BY: EUGENE L. HAHM  
16 Attorney at Law  
17 1841 Page Mill Road, Suite 200  
18 Palo Alto, California 94304  
19 650.812.1377  
20 ehahm@manatt.com  
21  
22  
23  
24  
25

3

1 APPEARANCES (Continued):  
2  
3 For Maritime Communications/Land Mobile, LLC:  
4 GRAHAM CURTIN  
5 BY: KELLEY HASTIE  
6 Attorney at Law  
7 4 Headquarters Plaza  
8 Morristown, New Jersey 07962-1991  
9 973.292.1700  
10 khastie@grahamcurtin.com  
11 (Present Telephonically)  
12  
13 Also Present:  
14 WARREN HAVENS (Present Telephonically)  
15 JIMMY STOBAUGH  
16  
17  
18  
19  
20  
21

22  
23  
24  
25

4

1 INDEX  
2 WITNESS: EXAMINATIONS  
3 MICHAEL T.N. FITCH  
Volume I

4

5 BY MR. ZELINGER 8

6

7 EXHIBITS

8 NUMBER PAGE

9 Exhibit 1 A table with a caption FCC 46  
rules, and purported to be  
10 a portion of Part 80 FCC  
Rules

11

Exhibit 2 An Order from March 64  
12 17, 2009 issued by the  
Deputy Chief of the  
13 Mobility Division of the  
Wireless Telecommunications  
14 Bureau of the FCC

15 Exhibit 3 An FCC Order On 68  
Reconsideration In the  
16 Matter of Maritime  
Communications/Land Mobile,  
17 LLC, and Warren Havens

18 Exhibit 4 An April 8, 2009 letter 75  
from the FCC signed by the  
19 Deputy Chief of the  
Mobility Division of the  
20 Wireless Telecommunications  
Bureau, to Dennis C.  
21 Brown, Esq. and labeled DA  
09-793

22

Exhibit 5 Expert Report of Michael 83  
23 T.N. Fitch, February 1,

2013

24

Exhibit 6 FCC Form 601 111

25

5

1 INDEX (Continued):

2

3

# EXHIBITS

4

NUMBER

PAGE

5

Exhibit 7 Documents, the first 123

6

document is an FCC letter

7

dated May 26, 2004, from

8

Tracy Simmons, Associate

9

Chief, Licensing Operation,

10

Public Safety and Critical

11

Infrastructure Division, to

12

S. Cooper, Paging Systems,

13

Inc.

14

Exhibit 8 An FCC letter dated 128

15

September 14, 2004 to Ms.

16

Audrey Rasmussen

17

Exhibit 9 A document, Comments of 134

18

Mobex Communications, Inc.,

19

to the Wireless

20

Telecommunications Bureau

21

of the FCC, In re: Auction

22

No. 57 related to the AMTS

23

Spectrum, DA 04-954

24

Exhibit 10 A document of charts, the 159

25

top line on the first page

26

says Notes:

27

Exhibit 11 A document of charts, the 163

28

top line on the first page

29

says Notes:

30

31

32

33

34

35

6

1 San Francisco, California; Friday, March 8, 2013  
2 10:13 a.m.  
3  
4 MICHAEL T.N. FITCH,  
5 having been administered an oath, was examined and  
6 testified as follows:

\*\*\*\*\*

98

1 number it is. It is the table you referred to earlier  
2 with the -- yes, sir -- Part 80 rules.

3 A Exhibit 1.

4 Q That's Exhibit 1, is it?

5 A Yes.

6 Q And I would ask you to turn to the second page  
7 thereof, and it's the last vertical frame at the bottom  
8 of that page which says "27, 28, et cetera," at the  
9 bottom left hand, and then it's referring to FCC rule  
10 80.49 et seq. Is that correct?

11 A Yes, it is.

12 Q I wonder if you would be kind enough in the  
13 right block to read the text in that block starting from  
14 the sixth line up starting with the words "For  
15 site-based."

16 A Yes.

17 "For site-based AMTS coast station licensees,  
18 when a new license has been issued or additional  
19 operating frequencies have been authorized, if the  
20 station or frequencies authorized have not been placed  
21 in operation within two years from the date of the  
22 grant, the authorization becomes invalid and must be  
23 returned to the Commission for cancellation."

24 Q Upon reading that and my representing to you  
25 that it is a verified copy of the, or version of the

99

1 rule, of the FCC rule, does that conflict with your  
2 earlier testimony, to your knowledge?

3 MR. HAHM: Objection. Form.

4 THE WITNESS: I don't think it conflicts with  
5 the earlier testimony necessarily, but I agree that this



6 does place an obligation on the licensee to act at that  
7 two year date if it has not met these conditions.

8 BY MR. ZELINGER:

9 Q Thank you.

10 I'd ask you to turn to the next page, the top  
11 block on the right which is Section 1.946. Is that  
12 correct?

13 A Yes.

14 Q May I ask you to read that aloud?

15 A Yes.

16 "Construction and coverage requirements.  
17 Omissions. (c) Termination of authorizations. If a  
18 licensee fails to commence service or operations by the  
19 expiration of its construction period or to meet its  
20 coverage or substantial service obligations by the  
21 expiration of its coverage period, its authorization  
22 terminates automatically (in whole or in part as set  
23 forth in the service rules), without specific Commission  
24 action, on the date the construction or coverage period  
25 expires."

100

1 Q Can you describe to me, Mr. Fitch, how this  
2 may, this provision may conflict with your earlier  
3 testimony just a few minutes ago?

4 MR. HAHM: Objection. Form.

5 THE WITNESS: I'm not sure that there is a  
6 conflict. I think that what I've said is that the rules  
7 often have a self-implementing nature, as this seems to.  
8 Notwithstanding that, sometimes the Commission acts in a  
9 way that is inconsistent with what the rule says will  
10 happen automatically. And some rule provisions such as  
11 80.49 do state that a licensee has a notification  
12 obligation, but others may not. So there is a variety  
13 of situations and circumstances.

14 BY MR. ZELINGER:

15 Q And to your knowledge, what is the notification  
16 obligation under 80.49 that you were referring to?

17 A As I read 80.49 it states that if you have an  
18 authorization that lapses pursuant to this provision it  
19 must, quote, must be returned to the Commission for  
20 cancellation, end quote.

21 Q I'm going to ask you now to look to the next

22 section on the third page of this same exhibit at  
23 Section 1.955. Would you be kind enough to read that  
24 aloud?  
25 A "1.955 Termination of authorizations. (a)

101

**[END]**

# **PLAINTIFF'S EXHIBIT 2**



## Universal Licensing System

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[FCC Site Map](#)

### Ownership Search

## Search Results

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[Printable Page](#) [Query Download](#)

### Search Criteria

File Number = **0002219422**

Filing Type in **C|P**

Ownership Disclosure Filings **1-1** of **1**

Filings marked ● were filed under Auctions Form 175. All other filings were filed on Form 602.

	<a href="#">Filer Name</a> ▲	<a href="#">File Number</a>	<a href="#">FRN</a>	<a href="#">Date Filed</a>	<a href="#">Filing Type</a>	<a href="#">Relationship to Filer</a>	<a href="#">Relationship Name</a>	<a href="#">Status</a>
➔ 1	<a href="#">Paging Systems, Inc.</a>	0002219422	0001546423	06/28/2005	Current	Filer	Paging Systems, Inc.	Complete

Ownership Disclosure Filings **1-1** of **1**

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Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Phone: 1-877-480-3201  
TTY: 1-717-338-2824  
[Submit Help Request](#)

**FCC 602  
Main Form****FCC Ownership Disclosure Information for the  
Wireless Telecommunications Services**

Approved by OMB  
3060 – 0799  
See instructions for  
Public burden estimate  
Submitted  
06/28/2005 at 3:13 PM  
File Number:  
**0002219422**

**Filing Type**

1a) <input checked="" type="checkbox"/> Current Filing	___ Proposed Filing
1b) Is the purpose of this filing to report cellular cross-ownership holdings required pursuant to section 1.919 of the Commission's Rules? ___ Yes ___ No	
If 'Yes', provide an exhibit with this filing that identifies the Rural Service Area market(s) involved, as well as the cellular licensee of which the filer has acquired direct or indirect ownership interest of 10% or greater.	

**Filer Information**

2) First Name (if individual):	MI:	Last Name:	Suffix:
3) Filer Name (if entity): Paging Systems, Inc.		4) FCC Registration Number (FRN): 0001546423	

**5) Contact Information**

Name and Address: Audrey P Rasmussen  PO BOX Suite 700 North 1120 20th Street, NW, Washington, DC 20036	Telephone Number: 202-973-1210
	Fax Number: 202-973-1212
	E-mail Address: arasmussen@hallestill.com

**Related FCC Regulated Businesses of Filer**

6a) Name of all FCC-Regulated Businesses owned by Filer (use additional sheets, if necessary):	6b) Principal Business:	6c) FCC Registration Number (FRN):	6d) Percent of Interest Held:
---	----------------------------	---------------------------------------	-------------------------------

**Signature****7) Typed or Printed Name of Party Authorized to Sign**

First Name: Susan	MI:	Last Name: Cooper	Suffix:
Title: President			
Signature: Susan Cooper			Date: 06/28/2005

**WILLFUL FALSE STATEMENTS MADE ON THIS FORM OR ANY ATTACHMENTS ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. Code, Title 18, Section 1001) AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, Section 312(a)(1) AND/ OR FORFEITURE (U.S. Code, Title 47, Section 503).**

**FCC 602  
Schedule A****FCC Ownership Disclosure Information for the  
Wireless Telecommunications Services**Approved by OMB  
3060 – 0799  
See instructions for  
Public burden estimate**Schedule for Disclosable Interest Holders****Disclosable Interest Holder Information (complete as many as required to describe all disclosable interest holders)**

1) Disclosable Interest Holder's First Name (if individual): SUSAN	MI:	Last Name: COOPER	Suffix:
2) Disclosable Interest Holder's Name (if entity):		3) FCC Registration Number(FRN):	
4) Disclosable Interest Holder's Address: 805 Burlway Road Burlingame, 940104249			
5) Type of Interest in Filer ( ) (refer to Instructions for a list of codes): Direct Ownership Interest in Filer Officer Director Key Management Personnel	6) Disclosable Interest Holder is a (n): ( ) (refer to instructions for list of codes): Individual	7) Percent of Interest Held in Filer: 100.00	
8) Disclosable Interest Holder's Type of Ownership ( ) (refer to instructions for a list of codes): Common Stock: Voting	9) Disclosable Interest Holder's Country of Citizenship or Jurisdiction of Formation: United States		

**Related FCC Regulated Businesses of Disclosable Interest Holders (repeat for each interest holder identified)**

10a) Name and address of all FCC-Regulated Businesses owned by the Disclosable Interest Holder listed in Item 1 or 2 (use additional sheets, if neccessary)	10b) Principle Business	10c) FCC Registration Number (FRN)	10d) Percent of Interest Held
PAGING SYSTEMS INC	MESSAGING	0001546423	100.00



## Information and Instructions

## FCC Ownership Disclosure Information for the Wireless Telecommunications Services

NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT OF 1974 AND  
THE PAPERWORK REDUCTION ACT OF 1995

We have estimated that each response to this collection of information will take on average 1.5 hours. Our estimate includes the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERF, Washington, DC 20554, Paperwork Reduction Project (3060-0799). We will also accept your comments via the Internet if you send them to [PRA@fcc.gov](mailto:PRA@fcc.gov). *Please do not send completed application forms to this address.*

You are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection unless it displays a currently valid OMB control number with this notice. This collection has been assigned OMB control number 3060-0799.

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this form. We will use the information you provide in evaluating pending licensing applications. If we believe there may be a violation or potential violation of a statute, FCC regulation, rule or order, your application may be referred to the Federal, state, or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your application may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government, is a party to a proceeding before the body or has an interest in the proceeding.

All parties and entities doing business with the Commission must obtain a unique identifying number called the FCC Registration Number (FRN) and supply it when doing business with the Commission. Failure to provide the FRN may delay the processing of the application. This requirement is to facilitate compliance with the Debt Collection Improvement Act of 1996 (DCIA). The FRN can be obtained electronically through the FCC webpage at <http://www.fcc.gov> or by manually submitting FCC Form 160. FCC Form 160 is available from the FCC's web site at <http://www.fcc.gov/formpage.html>, by calling the FCC's Forms Distribution Center 1-800-418-FORM (3676), or from Federal Communications Commission Fax Information System by dialing (202) 418-0177.

This notice is required by the Privacy Act of 1974, Public Law 93-579, December 31, 1974, 5 U.S.C. Section 552a(e)(3) and the Paperwork Reduction Act of 1995, Public Law 104-13, October 1, 1995, 44 U.S.C. 3507.



**Purpose of Form**

The purpose of FCC Form 602 is to collect ownership data pertaining to the filer for use by the FCC in determining whether the public interest would be served by a grant of the requested authorization. In doing so, the FCC uses FCC Form 602 to obtain information regarding the **identity of the real party or parties in interest** of the filer and to elicit additional information required by section 1.2112(a) of the Commission's Rules regarding: 1) persons or entities holding a 10% or greater direct or indirect ownership interest in the filer, *see* 47 C.F.R. § 1.2112(a)(1); 2) all limited partners whose interest in the filer is 10% or greater, *see* 47 C.F.R. § 1.2112(a)(2); 3) all general partners in any general partnership in the filer's chain of ownership, *see* 47 C.F.R. § 1.2112(a)(3); and 4) the members of any limited liability corporation whose interest in the filer is 10% or greater, *see* 47 C.F.R. § 1.2112(a)(4).

A "direct owner" is an individual or entity that holds an immediate interest in the filer. An "indirect owner" is an individual or entity that holds a 10% or greater interest in the filer as determined by successive multiplication as defined in section 1.2112(a)(5) through an intervening entity or entities in an ownership chain. *See* 47 C.F.R. § 1.2112(a)(5). For each direct and indirect owner, the filer must provide all FCC-regulated entities or applicants for an FCC license in which the direct or indirect owner has a 10% or greater direct or indirect ownership interest as determined by successive multiplication.

**Example:** In the following example Company A is the filer. Company A's stock is owned by two persons: Mary Smith owns 40% of the outstanding stock and Company B owns 60% of the outstanding stock. Each of these persons is a direct owner and a separate FCC Form 602, Schedule A would be filled out for each. Company B is in turn owned by John and Jane Doe, 50%, and by Mega Corporation, 50%. John and Jane Doe and Mega Corporation are indirect owners of the filer. An FCC Form 602, Schedule A would be separately filled out for John Doe, Jane Doe and Mega Corporation. Mega Corporation is in turn owned by Richard Mega, who holds 91% of the outstanding stock, as determined by successive multiplication, and Peter Smith, who holds 9% of the outstanding stock. Because Richard Mega indirectly owns more than 10% of Company A, information regarding Richard Mega would be provided on a FCC Form 602, Schedule A. However, because Peter Smith's indirect ownership share of Company A, when calculated using successive multiplication, is less than 10%, the filer would not be required to provide information regarding Peter Smith.

**Information Current and Complete**

During the pendency of the above mentioned applications, information contained in FCC Form 602 on file with the FCC must be kept current and complete. Pursuant to section 1.65 of the Commission's Rules the applicant must notify the FCC regarding any substantial and significant changes in the information furnished in the FCC Form 602 or underlying application(s). *See* 47 C.F.R. § 1.65.

**Applicable Rules and Regulations**

Filers should obtain the relevant parts of the FCC's rules in Title 47 of the Code of Federal Regulations (47 CFR). Copies of 47 CFR may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402, (202) 512-1800. Copies of 47 CFR may also be obtained, free of charge, from the Government Printing Office's Website at <http://www.access.gpo.gov>. Some FCC rules require applicants to attach one or more exhibits to an application in addition to the information requested in the application form.

**Processing Fee and Filing Locations**

No processing fee is required with the filing of FCC Form 602 separate and a part from any applicable filing fees for the associated application for authorization.

**For Assistance**

For assistance with FCC Form 602 call FCC Support Center at (877) 480-3201 (TTY 717-338-2824). To provide quality service and ensure security, all telephone calls are recorded.

**Electronic Filers**

For technical assistance with filing electronically, you may visit the web at <http://esupport.fcc.gov>. You may also call FCC Support Center at (877) 480-3201 (TTY 717-338-2824). To provide quality service and ensure security, all telephone calls are recorded.